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# The Cleft: The Similarity of Fundamental Doctrines of Law which Underlies their Conceptual Formulation in Different Legal Systems

By RALPH A. NEWMAN\*

*The chapter of History that must soonest be rewritten is the chapter of the Assimilation and Harmonization of World-Law.\*\**

CARDOZO, in his famous lectures on The Nature of the Judicial Process, refers to the presence in Anglo-American law of "certain large and fundamental concepts, which comparative jurisprudence shows to be common to other highly developed systems."<sup>1</sup> Many of the fundamental concepts, of which Cardozo and others—Vico,<sup>2</sup> an Italian, Ehrlich,<sup>3</sup> a German, Würzel,<sup>4</sup> an Austrian, and Ripert,<sup>5</sup> a Frenchman—have spoken, arise out of "standards of right conduct, which find expression in the mores of the community,"<sup>6</sup> and which, as Del Vecchio has superbly said,<sup>7</sup> measure the degree of the humanity of laws. Another type of fundamental concept is based only indirectly on standards of individual morality and is aimed primarily at establishing the conditions of an effective social order.<sup>8</sup> The evolution of law

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\*\* Wigmore, *Editorial Preface* to the PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY.

<sup>1</sup> CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 65 (22d ed. 1964).

<sup>2</sup> VICO, PRINCIPALI DI UNA SCIENZA NUOVA D'INTERNO ALLA COMUNE NATURA DELLA NAZIONI (2d ed. 1725). For an excellent discussion of Vico's philosophy see Cocheri, *Les Grandes lignes de la philosophie historique et juridique de Vico* (Thèse Paris 1923).

<sup>3</sup> EHRLICH, PRINCIPLES OF THE SOCIOLOGY OF LAW (1962). "Those elements that are universally human, and that must exist in every society." *Id.* at 298.

<sup>4</sup> WÜRZEL, DAS JURISTISCHE DENKEN § 26 (1904).

<sup>5</sup> RIPERT, 2 RECUEIL DES COURS DE L'ACADEMIE DU DROIT INTERNATIONAL No. 6, at 575 (1933).

<sup>6</sup> CARDOZO, *op. cit. supra* note 1, at 72. ALLEN, LAW IN THE MAKING (6th ed. 1958) says that "the popular sense of justice has a real meaning in law, since it represents an average element in the community with which it is necessary that law should harmonize; and most of the equitable or discretionary ingredients which are constantly found in legal systems are based on this primary sense of justice inherent in the average moral sense of the community." *Id.* at 405.

<sup>7</sup> Del Vecchio, *Les bases du droit compare et les principes généraux du droit*, 12 REVUE INTERNATIONALE DE DROIT COMPARÉ 493 (1960).

<sup>8</sup> Stammer, LEHRE VON DEM RICHTIGEN RECHTS 208 (1919).

consists of the progressive harmonization of individual and social values, starting with security, advancing to individual justice and reaching finally the stage of social cooperation to attain the individual goals of existence. Legal values cannot be arbitrarily divided into those which satisfy either individual, or social, interests. These interests frequently conflict, but there are also many circumstances in which they coincide. Societies consist of individuals. The satisfaction of individual interests requires organs of social control to reconcile conflicts in the interest of the whole social group, but there is also a strong social interest in the individual life. It seems that the doctrines which are based primarily on the demand for individual justice rather than on the need for social order exhibit a closer resemblance to each other in different legal systems; but whatever their objectives, the basic institutions of law in many different systems exhibit an essential similarity. There seems to be no reason why these elements could not constitute a common core of understanding for uniting legal systems in what has been called a common law of mankind<sup>9</sup> and provide an effective means of communication, among nations, of ideals of individual justice and social progress. If a system of private world law is, as many legal philosophers feel, in the process of being formed, an essential step in the process must be to reconcile the fundamental concepts of existing legal systems.<sup>10</sup>

It has been said that law "is not a mere enumeration of formal rules, but is the translation of the most profound aspirations of people."<sup>11</sup> It should not surprise one to find that law in different parts of the world produces similar institutions, since the need for law arises out of deeply seated emotions of human nature; emotions which are not essentially different in people of different parts of the world. Nor should it surprise one to find that the particular manifestations of these fundamental emotions differ in the course of their multifarious applications in different times, circumstances and cultures. It has long since ceased to be fashionable to ignore the methods which have been employed in other parts of the world for the solution of conflicting human interests. One of the world's greatest comparatists has said

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<sup>9</sup> JENKS, *THE COMMON LAW OF MANKIND* 172 (1958). In popular Latin, *ius gentium* meant the common law or usage of mankind. *Lex naturalis* was the translation of φυσικόν δίκαιον of the Greeks—natural law.

<sup>10</sup> "Avant de parler d'unification, il est nécessaire de coordonner entre eux les systèmes existants." (Before we talk of unification, we must coordinate the existing systems) LEVY-ULLMAN, *VERS LE DROIT MONDIAL DU XXe SIECLE*. Sarfatti, *Le droit comparé en fonction de l'unification du droit*, 3 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 69, 71 (1951).

<sup>11</sup> RENÉ CASSIN, *INTERNATIONAL LAWYERS CONVENTION IN ISRAEL* 337 (1958).

that "our foremost task is to bridge the age-old cleft that runs through the western laws, separating the Anglo-American 'common law' from the 'civil law'"<sup>12</sup> Most studies in comparative law are addressed to the differences between legal systems. Such studies, which are, of course, essential, reveal that the differences are largely in rules of application of underlying principles which are not essentially dissimilar from one legal system to another. The cleft, on close examination, apparently results from superficial flaws rather than from basic faults. We can help to bridge the cleft by remembering Hegel's aphorism that one can relate a thing to something else by perceiving the similarities as well as the differences. It is the purpose of the present study to examine some basic doctrines of private law which, although they are expressed in formulae which differ from nation to nation, will be seen, when they are analyzed from the viewpoint of their actual effect on the solution of legal controversies, to approach one another more and more closely in the course of the evolution of law and as the true objectives of law become more clearly identified. It is felt that such an analysis will reveal the essential similarity of the underlying doctrines which are expressed, in different legal systems, in very different conceptual forms.

## The Nature of Ownership

### *Ownership of the Thing Versus Ownership of Interests*

There is a basic conflict between the conceptual approach in common law and in civil law to the nature of ownership of property. The civil law regards ownership as ownership of the physical property. Obviously, there cannot be exclusive ownership of a physical piece of property by different persons at the same time. The Roman law doctrine of *dominium*, according to which divided ownership of property is impossible, has been preserved in the civil law doctrine of absolute and indivisible ownership. There can be in civil law no divided ownership,<sup>13</sup> although the ownership may be subject to restrictions which permit exclusive enjoyment of the property by one person for a period of time and which will entitle another person to the exclusive enjoyment of the property in the future. In the common law no one need

<sup>12</sup> Rabel, *Private Laws of Western Civilization*, 10 LA. L. REV. 1 (1949).

<sup>13</sup> CODE CIVIL FRANCAIS art. 544 (57th ed. Dalloz 1958) [hereinafter cited as FRENCH CIVIL CODE]; BÜRGERLICHES GESETZBUCH § 903 (Ger. 22d ed. Palandt 1963) [hereinafter cited as GERMAN CIVIL CODE]; CODE CIVIL SUISSE art. 642 (1937) [hereinafter cited as SWISS CIVIL CODE]; R.S.F.S.R. CIVIL CODE art. 58 (U.S.S.R. 1931) [hereinafter cited as SOVIET CIVIL CODE].

own all the property<sup>14</sup> Ownership is looked upon as ownership of different interests in the physical property on the plane of time. Different persons may own different interests in a piece of property at the same time, even though the enjoyment of the property may be postponed until different periods. The person who is entitled to the present enjoyment of the property for a period may be the owner of an interest in the property for that period, and at the same time another person, who will be entitled to the enjoyment of the property thereafter, may be the owner of an interest which he will enjoy in the future. In the common law, contemporaneous ownership of interests, which entitle different persons to enjoy the property during different periods of time, is possible. Otherwise stated, ownership can exist even if the right of enjoyment is postponed. One would expect to find that, in civil law, ownership could exist only if accompanied by the present right of enjoyment. It is at this point that a fallacy of the civil law concept of indivisible ownership is revealed, since ownership can exist in civil law, just as in common law, without a contemporaneous right of enjoyment of the property

The common law doctrine of estates in land originated out of the needs which arose in a system of feudal tenure. Under this system, which has long since become obsolete, the Crown owned all the land, and only interests in the land could be privately owned by feudal tenants. This system of landholding was carried into the lower echelons of feudal tenure. In modern law the division of property ownership into present and future interests is the conceptual basis of successive rights to the enjoyment of the property. The same motive, provision for successive rights of enjoyment of property, underlies many institutions of the civil law, and these institutions display close resemblance to the common law doctrine of estates. The distinction is in conceptual approach rather than in substantive rights and obligations. In civil law, in the case of successive rights of ownership, there is no power in the person entitled to the current enjoyment to alienate the property gratuitously. If the property is sold the proceeds are subject to the same rights of succession to the enjoyment which existed before the sale; but this may be so in common law as well. In common law, a power of sale does not necessarily transform a present right of possession and enjoyment into ownership in fee;<sup>15</sup> nor does the requirement

<sup>14</sup> "French law knew of land that was owned; but from the time of the Conqueror English law only knows of land that is held." Holdsworth, *Introduction to BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW* at xxv (1912).

<sup>15</sup> 2 SIME & SMITH, *FUTURE INTERESTS* § 893 (2d ed. 1956). The remainder which follows such an interest is valid. *Lord v. Atchison*, 12 Cal. 2d 691, 87 P.2d 346 (1939); 3 SIME & SMITH, *op. cit. supra* at § 1488.

that the proceeds be substituted for the property sold preclude the existence of present ownership, as is demonstrated in the common law trust by recognition of a trustee's ownership of trust property as to which a power of sale exists.

The strong paternalism of European governments is reflected in the extent to which law intervenes in social and economic life. An example is the restrictions placed on the power to create successive rights of enjoyment of property. Such rights may be created, in civil law, only in favor of specified classes of persons and in specified situations. It should be recalled that only by reason of unexpected consequences of the English Statute of Uses<sup>16</sup> was a comparable rigidity removed from the common law institution of estates in land. The effect of the executory interests which could be created under the Statute was to validate limitations which could not take effect as contingent remainders according to the rules of common law.<sup>17</sup> There are many situations in civil law in which property interests are valid, which closely approach the common law concept of ownership divided according to the time when the enjoyment is to begin and according to the duration of the enjoyment.

### *Successive Ownership in Civil Law*

In civil law, succession of interests in property is provided for by two institutional techniques. In one of these techniques the entire ownership is in the first taker, subject to a right of other persons to become the owners on his death. In the other technique, ownership is charged with the use of the property by other persons for their lives or for a shorter period, similar to the ancient *use* of common law and resembling in many respects the modern common law trust.

In French law, property may pass by *inter vivos* gift, on the death of the donor, to a party to a marriage or to the children to be born of the marriage if the donor survives the immediate donees.<sup>18</sup> This transfer is very similar to the creation in common law of a shifting estate or a contingent remainder following a retained life estate. A similar kind of transfer may be made, *inter vivos* or by will, on the condition that if the donor dies leaving no children, the property shall belong to his brothers or sisters and, on their death, to all their children.<sup>19</sup>

In German law also it is possible to create successive ownership

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<sup>16</sup> 27 Hen. 8 c. 10 (1536).

<sup>17</sup> 4 KENT, COMMENTARIES 268 (14th ed. 1896).

<sup>18</sup> FRENCH CIVIL CODE art. 1082.

<sup>19</sup> FRENCH CIVIL CODE art. 1049.

of property. The doctrine of *Vorerbschaft*, or forced heirship, treats the first heir, the *Vorerbe*, as the owner of not merely an interest for his life but as the owner of the entire property until the stipulated event occurs and the property devolves upon the *Nacherben*, the secondary heirs. Section 2100 of the German Civil Code provides that "the testator may appoint an heir so that he does not become heir until another has first been heir." Section 2103 provides that "if the testator has directed that the heir at a certain point of time, or upon the occurrence of a certain event shall surrender the inheritance to another, it is to be assumed that the other is appointed as reversionary heir." These are shifting estates which at common law would be executory interests or contingent remainders. Section 2105 provides that "if the testator has directed that the appointed heir shall receive the inheritance only at a certain point of time, or upon the occurrence of a certain event, without directing who shall be the heir until then, the legal heirs of the testator are the immediate heirs." This interest corresponds to a springing estate at common law. Section 2109 provides that "the appointment of a reversionary heir becomes of no effect upon expiration of thirty years after the succession, unless the event of the subsequent succession has occurred before." In the situations to which the rule applies, it constitutes a Rule Against Perpetuities. There are provisions in the Austrian Civil Code<sup>20</sup> which restrict the number of successive transfers of property, and in Swiss law<sup>21</sup> only one reversionary heir may be appointed. In these kinds of successions the first heir cannot destroy the subsequent interest by a sale, since the proceeds are substituted in law for the property sold; and he cannot dispose of the property gratuitously unless pursuant, in some cases, to a moral duty. This system of transmitting property is confined to the transfer (by instruments of testamentary nature although not necessarily wills) of the estate as a whole, to successive owners.<sup>22</sup> The system does not apply to the transfer of separate parcels. In a New York case, which involved the ownership of New York land by a German citizen, it was held that the restriction on donative transfers made the interest of the first heir a life estate, under rights and obligations similar to those of holders of life estates at common law. Therefore the court concluded that the estate was not liable for estate

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<sup>20</sup> OESTERREICHISCHE GESETZ arts. 611-12 (Austria 25th ed. Kapber 1955) [hereinafter cited AUSTRIAN CIVIL CODE].

<sup>21</sup> SWISS CIVIL CODE art. 488(2).

<sup>22</sup> See Rheinstein, *Some Fundamental Differences in Real Property Ideas of the "Civil Law" and the Common Law Systems*, 3 U. CHI. L. REV. 624, 626-27 (1936).

tax on the death of the life tenant.<sup>23</sup> The power to sell the property and to substitute the proceeds did not, according to common law principles, enlarge the estate into a fee simple. The court held that a life estate with power to invade the corpus followed by remainders to the sons had been created.

The system of forced heirship, existing in all civil law countries, establishes rights which, except for the restriction against gratuitous transfers and the restriction that the proceeds of a sale are substituted in law for the property sold, are almost indistinguishable from a theoretically perpetual series of life estates. The civil law institution of forced heirship may also be analogized to the common law estate tail as it formerly existed in England and which is still recognized to a limited extent in a few states.<sup>24</sup> The first taker of an estate tail was the owner of the entire estate, but he could not cut off the rights of expectant heirs. Similarly, in the civil law institution of forced heirship, the first heir owns the entire property. The expectant heirs own no rights in the property, but in case of a sale, their rights to become the owners in the future prevent termination of their interests by the legal technique (however ineffective in practical result) of substituting the proceeds in place of the property sold. In civil law jurisdictions the creation of such estates is not left to the voluntary act of the current owner of the property, as it is in common law, but is imposed by law; the system not only permits but requires a potentially perpetual succession of life estates. In common law the entailment of the property is far less prolonged, since the duration of divided ownership is subject to severe restrictions by the Rule Against Perpetuities in the case of contingent interests and by the rule against protracted suspension of the power of alienation in the case of both vested and contingent interests.

### *Ownership Subject to Rights of Others in Civil Law*

Although in civil law a portion of the estate, called in French law the *réserve légitime* and in German law the *Pflichtteilsrecht*, descends to the heirs, the rest of the estate is freely disposable. From the Frankish period one encounters estates consisting in the enjoyment of land for life.<sup>25</sup> The property interest which is known in civil law as

<sup>23</sup> *In re Hirschmann's Estate*, 124 N.Y.S.2d 801 (Surr. Ct. 1953).

<sup>24</sup> Delaware: *Hazzard v. Hazzard*, 29 Del. 91, 97 Atl. 233 (1916). Maine: *McCarthy v. Walsh*, 123 Me. 157, 122 Atl. 406 (1923). Massachusetts: *Gilke v. Marsh*, 186 Mass. 336, 71 N.E. 703 (1904). Rhode Island: *Sackett v. Pame*, 46 R.I. 439, 128 Atl. 209 (1925).

<sup>25</sup> BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW § 329 (1912).



the *usufruct*, and which exists in French, German, Swiss, Italian, Austrian and Spanish law, closely resembles the Anglo-American life estate. The right of *usufruct* is the right to use the property and to receive the fruits; the *usus* and the *fructus*.<sup>26</sup> "The usufruct is the right to enjoy things belonging to another person, as the proprietor himself, but subject to the charge of conserving the substance."<sup>27</sup> The "thing" is "*grevé d'usufruit*,"<sup>28</sup> charged with the use. Planiol criticizes the foregoing definition of the *usufruct* in the French Civil Code on the ground that it neglects to state that the *usufructuary's* enjoyment is essentially a life estate and that it operates as a real right.<sup>29</sup> The institution of *usufruct* is derived from Roman law,<sup>30</sup> where, because Roman law looked at property as indivisible, it was one of the personal servitudes. The view of property as indivisible was appropriate to a simpler societal culture, and it is probably responsible for the sharp distinction drawn in civil law between the right to the use of property and the right to the corpus of the property. In civil law the institution of *usufruct* has been elevated to the status of a property right.<sup>31</sup> The *usufruct* in French law is contrasted with the *nu-propriété*, the naked ownership of the property. The *usufructuary* has the *usus* and the *fructus*, but the right of alienation is in the *nu-proprétaire*.<sup>32</sup>

<sup>26</sup> MAZEAUD, MAZEAUD & MAZEAUD, *LECONS DE DROIT CIVIL* No. 163 (3d ed. 1963).

<sup>27</sup> FRENCH CIVIL CODE art. 578.

<sup>28</sup> Judgment of July 10, 1963, [1963] *Recueil Dalloz* 644 (Cass. civ. 1re).

<sup>29</sup> PLANIOL & RIPERT, *TRAITÉ PRATIQUE DU DROIT CIVIL FRANCAIS* pt. 2, No. 2747 (12th ed. 1939). Holdsworth, in his *Introduction* to BRISSAUD, *op. cit. supra* note 14, at xxxix says that "if our common law had been developed by lawyers like Bracton who had a knowledge of medieval French law, the course of its history would have taken on the history of the law of the 'pays du droit coutumier,' and our reversions and remainders would have been substitutions in trust; our estates for life would have been usufructs." Maitland explains the obligation of feudal tenants, until the year 1200, to obtain the lord's consent to alien the fee on the theory that the tenant was considered nevertheless to be the owner, but whose power to alienate was restrained. See Thorne, *English Feudalism and Estates in Land*, *CAMB. L.J.* 193 (1959). This could well be the explanation of the forced heirship of civil law.

<sup>30</sup> A codicil granted land to a grandson on the terms that he was not to alienate it away from his land and family. Those who had issue were to leave it to them, with cross gifts to survivors, of the shares of those who died without issue. An heir of the testator claimed the property on the ground that the wife and mother were not of the family. It was held that they were members of the family, so that there had been no breach; but Justinian decreed that the present holders might do what they liked with the property, and that for the future no such prohibition was to be allowed for more than four generations. This became the "common" law fideicommissary substitutions in the countries governed by Roman law. BUCKLAND, *A TEXTBOOK OF ROMAN LAW* 363-64 (3d ed. 1963). See *Strickland v. Strickland*, [1908] A.C. 551.

<sup>31</sup> See GERMAN CIVIL CODE § 1065.

<sup>32</sup> MAZEAUD, MAZEAUD & MAZEAUD, *op. cit. supra* note 26, No. 163.

There are in French law three types of *usufruct* which arise by operation of law and which Planiol calls "legal" *usufructs*: (1) the right of parents in things of their children until the children attain the age of eighteen; (2) the right of a surviving parent upon the succession of children; and (3) the right of a surviving spouse.<sup>33</sup> In addition, rights of *usufruct* may be created by private act. A charge, called the *pension viagère*, may be created in favor of a surviving spouse,<sup>34</sup> and the property may be conveyed to the direct heir, reserving the *usufruct* to the former owner.<sup>35</sup> The right of the *usufructuary* is limited to a use which will not destroy the substance of the property,<sup>36</sup> under penalty of the loss of the right of *usufruct*.<sup>37</sup> Only the rights of the *usufructuary* can be transferred by him, and not the ownership of the physical property itself, even for the life of the *usufructuary*.<sup>38</sup> This restriction would seem to be of little practical importance in most cases, since it would be only rarely that a person would buy property which he could never enjoy unless he outlived the *usufructuary*. The right of the *usufructuary* includes the right to possession,<sup>39</sup> upon giving such security as may be required by the court. This security is not required where it is eliminated in the instrument by which the *usufruct* was created<sup>40</sup> or, in a few special situations, where the *usufructs* are created by law. In all civil law systems, freely disposable property may be transferred (either inter vivos or by will) to a person for his life, the donor or his estate retaining an interest which is very similar to the common law reversion.

### *Limitations on Rights of Ownership*

#### *Servitudes*

The doctrine of indivisible ownership of land is subject, even in civil law, to important exceptions in the case of rights to use the property of another. The institution of servitudes has been inherited from Roman law. As in common law, servitudes are deemed to be interests in the land over which the right to use them exists. Servitudes are recognized in French, German, Italian and Soviet law. Discussions of servitudes in French law avoid the terms "servient" and "dominant"

<sup>33</sup> 1 PLANIOL & RIPERT, *op. cit. supra* note 29, No. 2761.

<sup>34</sup> FRENCH CIVIL CODE art. 205.

<sup>35</sup> FRENCH CIVIL CODE art. 918.

<sup>36</sup> FRENCH CIVIL CODE art. 578; GERMAN CIVIL CODE § 1041.

<sup>37</sup> Judgment of July 10, 1963, [1963] Recueil Dalloz 644 (Cass. civ. I<sup>re</sup>).

<sup>38</sup> MAZEAUD, MAZEAUD & MAZEAUD, *op. cit. supra* note 26, No. 163.

<sup>39</sup> FRENCH CIVIL CODE arts. 600-01; GERMAN CIVIL CODE § 1036.

<sup>40</sup> FRENCH CIVIL CODE art. 601.

estates for fear of reviving memories of feudalism;<sup>41</sup> but there is nevertheless a charge on one estate for the benefit of another estate. Since the charge may be perpetual,<sup>42</sup> it is no different from a property interest; and in fact servitudes are described in the French Civil Code as "héritages."<sup>43</sup> In German<sup>44</sup> and Soviet<sup>45</sup> law, the remedies for the enforcement of servitudes are different from the remedies which are available for the protection of rights of ownership; but if the servitude permits possession of the land, the holder may also assert the possessory remedies which are available in both those countries.<sup>46</sup> The civil law servitude thus seems to constitute another example of divided rights of ownership which are thoroughly recognized in civil law

### *Trusts*

The same principle of indivisible ownership, which in the view of most civilian jurists precludes the reception in civil law of the common law concept of estates in property, is thought by civilians to present an equally insuperable obstacle to the reception in civil law jurisdictions of the common law trust. The reason for this reluctance to accept the trust is that the trust is based on rights of different persons in the trust estate. The trustee has legal title to the property and the beneficiary has, depending on the view of the particular common law jurisdiction, either an equitable interest in the property or a right to compel the trustee to carry out his duties in respect to the purposes for which the property is to be used. The view of the beneficiary's interest as an interest in the property is not essential to the validity of the trust, as is evidenced by the acceptance of the trust in New York and California, in which states the right of the beneficiary is not a property right at all but is merely a personal right against the trustee. It is still true, however, whether the interest of the beneficiary is regarded as real or personal, that the interests of the trustee and of the beneficiary may conflict. There are many situations in which civil law institutions exist which are not essentially unlike the common law trust, and the common law trust has been accepted in many civil law countries without creating any alarming distortion of the conceptual structure of the legal systems of those countries.

<sup>41</sup> Judgment of July 27, 1874, [1875] *Recueil Périodique et Critique* I. 375 (Cass. civ.); see FRENCH CIVIL CODE art. 637; *accord*, GERMAN CIVIL CODE § 1019, CODICE CIVILE art. 531 (Italy 1948) [hereinafter cited as ITALIAN CIVIL CODE].

<sup>42</sup> I PLANIOL & RIPERT, *op. cit. supra* note 29, No. 2888.

<sup>43</sup> See BEAUMANIOR, *COUTUMES DE BEAUVAISIS* ch. 23 (1889-1890).

<sup>44</sup> GERMAN CIVIL CODE §§ 1004, 1027.

<sup>45</sup> SOVIET CIVIL CODE art. 1132.

<sup>46</sup> GERMAN CIVIL CODE § 1029; SOVIET CIVIL CODE art. 996.

Roman law recognized the trust concept in the doctrine of *fideicommissum*, which in later Roman law became a device for enforcing the rights of a beneficiary to whom the testator wished to leave the property but who was ineligible to receive it directly from the testator. The property could be left to an intermediate taker to hold for the ultimate beneficiary. The immediate taker was entitled to enjoy the property for his lifetime. Another device, the *usufructus*, compensated for the defective rights of a surviving spouse. Also, from the time of Hadrian, there could be provision by will for the maintenance of a child until puberty. Finally, there was the institution of *hereditas jacens*, a juristic person who represented the undetermined heirs until they accepted their inheritance. From the *fideicommissum* developed the civil law institution of the fideicommissary substitution, or the entailing of property for a limited term.

In the law of France there are many analogies to the common law trust. A guardian may be appointed to administer the property which has been given to the beneficiary, even if the beneficiary is of full age, and this period of administration may continue for the lifetime of the donee.<sup>47</sup> Property may be given to children subject to a charge for their children in turn, and the income may be accumulated during the minority of a beneficiary, with a special administrator to accumulate the revenue.<sup>48</sup> There are similar provisions in the Swedish Law as to Intestate Succession.<sup>49</sup> In all civil law countries there is provision for public foundations which are no different in any essential respect from the charitable trust of Anglo-American law. Examples are to be found in the Spanish Civil Code,<sup>50</sup> in the Austrian Civil Code<sup>51</sup> and in the German institution of *Stiftung*, a foundation with juristic personality. The foundation, a legal person, owns the property, without the intervention of any trustee; but in the United States, direct gifts to charitable corporations for specified purposes are treated in the same manner and with the same consequences as trusts for charity. The family foundation of Swiss law<sup>52</sup> goes further than the common law private trust because it may last forever, although the provision is strictly construed.<sup>53</sup> The rights of the beneficiary are purely *in per-*

<sup>47</sup> FRENCH CIVIL CODE art. 1055.

<sup>48</sup> FRENCH CIVIL CODE art. 1073.

<sup>49</sup> SWEDISH LAW AS TO INTESTATE SUCCESSION c. 8 (1928).

<sup>50</sup> CODIGO CIVIL ESPANOL art. 35 (Spain 1955) [hereinafter cited as SPANISH CIVIL CODE].

<sup>51</sup> AUSTRIAN CIVIL CODE art. 646.

<sup>52</sup> SWISS CIVIL CODE art. 335.

<sup>53</sup> 73 Entscheidungen des Reichsgerichts in Zivilsachen II. 87 (1947).

*sonam* and cannot protect the property itself against improper transfer, as is also the case in the German concept of *Treuhand*. In the civil law countries, as in the United States, there may be trusts for masses. That the common law trust presents no conceptual difficulties in civil law jurisdictions is amply demonstrated by the acceptance of trusts in Scotland, South Africa, Ceylon, Chile, Venezuela, Panama, Mexico,<sup>54</sup> Quebec, Japan,<sup>55</sup> Louisiana, and, in the case of business trusts, Lichtenstein. In Venezuela, although the legal system of that country is based on Italian law in which trusts are anathema, there may be trusts for living persons, as is also the case in Mexico if the trustee is a bank with credit powers. Regardless of the conclusion which may be reached in any particular civil law country as to the practical desirability or lack of desirability of the common law trust, it seems clear that no conceptual obstacles bar its reception in civil law.

It is clear that there are many exceptions to the civil law concept of indivisible ownership. The conception of the nature of the interest of successive owners, as an absolute ownership rather than a life estate, and the conception of the right of *usufruct* as a right to the income, or "fruits," of the property without any ownership of either a life estate or an absolute interest in the corpus of the property, approximate the Anglo-American concept that property can be held in ownership divided into present and future interests. Conceptually, the Anglo-American institution of estates in property may be looked upon as falling midway between the two civil law institutions: the succession of absolute ownership and charges on absolute ownership for the present or future use of other persons. There would seem to be little practical difference whether there are two owners of different estates in the same property, as in the common law, or one owner of property charged, as in the civil law, with the right of another person to become the owner of the property in the future. The civil law doctrines of indivisible ownership and the common law doctrine of estates, often cited as the basic distinction which differentiates property ownership in Anglo-American countries from ownership in civil law, thus produce substantially similar results. The relatively unimportant differences in the practical results should not obscure the essential similarities of doctrine.

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<sup>54</sup> The trustee must be a corporation with credit powers. See BATIZA, TRUSTS IN MEXICO, IN CIVIL LAW AND IN THE MODERN WORLD 128-31 (1965).

<sup>55</sup> The reception began in 1905. For the development since then see the Japanese statutes referred to in Kashikawa, Book Review, 8 HOSÉ NAGOYA 30 (1965).

### Transfers of Personal Property by Possessors without Title or Authority to Transfer

The problem of the rights of a person who acquires personal property from another person who was in possession of the property without either title or authority to transfer, is dealt with in civil law and common law from exactly opposite approaches. A basic doctrine of the law of property in civil law is that possession of tangible, movable property is equivalent to title when rights of third persons are concerned. This doctrine, which is an outgrowth of the civil law concept of indivisible ownership, is expressed unequivocally in the civil codes of France,<sup>56</sup> Switzerland<sup>57</sup> and Germany.<sup>58</sup> The basic approach of the common law is precisely the opposite. There, a bona fide purchaser for value, from one who was in possession but without authority from the owner to sell, acquires no greater rights than inhered in the person who was in possession when the property was acquired,<sup>59</sup> in the absence of some special circumstances or estoppel against the true owner.<sup>60</sup>

In Roman law there was no doctrine resembling the doctrine that possession is equivalent to title; no right based on possession apart from ownership was recognized, and thus the owner received complete protection and could reclaim his goods, whenever they had come into the possession of another person without the owner's consent.<sup>61</sup> Only by long-continued possession, the doctrine of *usucapio*, could rights be acquired by another person and the right of ownership be separated from the right to possession. Goods which had been stolen or lost could not be acquired even by prescription; and only when the acquirer was ignorant of the rights of the true owner did the statute transfer to him the right of ownership.<sup>62</sup> The doctrine was abandoned in France in the sixteenth century and was replaced by the doctrine that possession is equivalent to title when the rights of third persons are concerned. Curiously, the Roman doctrine which protected the rights of the owner re-appeared in the common law. Despite the

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<sup>56</sup> FRENCH CIVIL CODE art. 2279; DE FOLLEVILLE, *TRAITÉ DE LA POSSESSION DES MEUBLES ET DES TITRES AU PORTEUR* No. 8 (2d ed. 1875).

<sup>57</sup> SWISS CIVIL CODE art. 919.

<sup>58</sup> GERMAN CIVIL CODE § 932.

<sup>59</sup> See Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887).

<sup>60</sup> O'Connor v. Clark, 170 Pa. 318, 32 Atl. 1029 (1895).

<sup>61</sup> GAIVS, *INSTITUTIONUM JURIS CIVILIS* comment 2, § 45 (4th ed. Poste transl. 1904); DE FOLLEVILLE, *op. cit. supra* note 56, No. 11.

<sup>62</sup> DE FOLLEVILLE, *op. cit. supra* note 56, at No. 11.

adoption of the doctrine that possession is equivalent to title, Article 1116 of the French Civil Code provides that an acquirer with knowledge of the rights of a third person must surrender the property to the true owner. Title does not pass, in civil law, to an acquirer in bad faith. This qualification of the basic doctrine goes far toward bringing the two approaches into closer resemblance than the basic conceptual approaches would seem to indicate.

The problem of what effect should be given to unauthorized transfers of personal property is usually approached in civil law from the viewpoint of comparing the benefits of security of property rights, which is considered to require a preference for the rights of the owner, and the benefits of facilitating the participation of property in trade, which is deemed to require encouragement of the salability of the property. The two considerations are only superficially antithetical, since the objective of participation in commerce is itself facilitated by the assurance of the right of an acquirer to retain his ownership against unauthorized transfers. In Anglo-American law, no clogging effect on commerce by the emphasis on security has been felt. Whatever the reason, in common law, almost controlling emphasis is placed on security of property; but in civil law, it is placed on salability.

In comparing the position of acquirers of personal property who have obtained the possession from a person without title or authority to make the transfer, four principal factors must be taken into account:

1. The circumstances under which the owner parted with possession—whether voluntarily or involuntarily, as for example through loss or theft;
2. The effect to be given to the acquirer's knowledge that his immediate transferee was without authority from the owner of the property to transfer it;
3. Whether the acquirer gave value for the property or received it gratuitously; and
4. The nature of the interest, whether title or possession, which passed to the acquirer.

1. The civil law countries draw, in general, a broad distinction between situations in which the property was originally transferred voluntarily by the true owner and situations in which the property was originally lost by the true owner or was stolen from him. The rule generally followed is that if the property was lost or stolen, the owner can reclaim it from a subsequent acquirer. This rule prevails in

France,<sup>63</sup> Belgium,<sup>64</sup> Germany,<sup>65</sup> Switzerland,<sup>66</sup> Spain<sup>67</sup> and Portugal.<sup>68</sup> In Italy<sup>69</sup> and Austria,<sup>70</sup> the acquirer prevails regardless of the manner in which the owner parted with or was deprived of the possession of the property. If the property, even though lost or stolen, was acquired at a fair, in a public market or from a merchant who dealt in similar articles, the owner's right to reclaim the article is subject to the condition that he must reimburse the acquirer for the price he paid for it. This qualification of the right of the owner to reclaim the property exists in France,<sup>71</sup> Belgium,<sup>72</sup> Switzerland,<sup>73</sup> Spain,<sup>74</sup> Portugal<sup>75</sup> and also in Mexico.<sup>76</sup>

2. Good faith—that is, absence of knowledge or reason to know of a limitation on the authority of the person in possession to transfer the property—is required to enable the acquirer to keep the property in France,<sup>77</sup> Belgium,<sup>78</sup> Germany,<sup>79</sup> Switzerland,<sup>80</sup> Italy,<sup>81</sup> Austria,<sup>82</sup> Spain<sup>83</sup> and Portugal.<sup>84</sup> But in Spain<sup>85</sup> and Portugal<sup>86</sup> even a good faith acquirer must surrender the property to the owner.

<sup>63</sup> FRENCH CIVIL CODE art. 2279.

<sup>64</sup> Belgium has adopted the edition of the French Civil Code published Sept. 3, 1897 except as abrogated by specific Belgian legislation.

<sup>65</sup> GERMAN CIVIL CODE § 935; HANDELSGESETZBUCH § 366 (Ger. 1902) [hereinafter cited as GERMAN COMMERCIAL CODE].

<sup>66</sup> SWISS CIVIL CODE art. 934.

<sup>67</sup> SPANISH CIVIL CODE art. 464; EL CODIGO DE COMERCIO art. 85 (Spain 1911) [hereinafter cited as SPANISH COMMERCIAL CODE].

<sup>68</sup> CODIGO CIVIL PORTUGUES art. 533 (Portugal 1948) [hereinafter cited as PORTUGUESE CIVIL CODE].

<sup>69</sup> ITALIAN CIVIL CODE art. 1153.

<sup>70</sup> AUSTRIAN CIVIL CODE art. 367; AUSTRIAN COMMERCIAL CODE art. 366.

<sup>71</sup> FRENCH CIVIL CODE art. 2280.

<sup>72</sup> Note 64 *supra*.

<sup>73</sup> SWISS CIVIL CODE art. 934.

<sup>74</sup> SPANISH CIVIL CODE art. 464, 1955; SPANISH COMMERCIAL CODE art. 85.

<sup>75</sup> PORTUGUESE CIVIL CODE art. 534.

<sup>76</sup> CODIGO CIVIL MEJICO art. 799 (1950) [hereinafter cited as MEXICAN CIVIL CODE].

<sup>77</sup> On the analogy of Article 1141. which refers to consecutive transfers; the earlier transferee prevails, if in good faith.

<sup>78</sup> Note 9 *supra*.

<sup>79</sup> GERMAN CIVIL CODE § 932; GERMAN COMMERCIAL CODE § 366. In German law good faith is established if the acquirer reasonably believed that a merchant had the right to transfer the property.

<sup>80</sup> SWISS CIVIL CODE arts. 714, 933, 936.

<sup>81</sup> ITALIAN CIVIL CODE art. 1147.

<sup>82</sup> AUSTRIAN CIVIL CODE art. 367; AUSTRIAN COMMERCIAL CODE art. 366.

<sup>83</sup> SPANISH CIVIL CODE art. 464; SPANISH COMMERCIAL CODE art. 85.

<sup>84</sup> PORTUGUESE CIVIL CODE art. 520.

<sup>85</sup> Decree of June 19, 1945, RÉVUÉ GÉNÉRALE JURISPRUDENCE CIVILE 376 (1945);



3. Except in Portugal<sup>87</sup> and Austria,<sup>88</sup> the fact that the acquirer received the property gratuitously does not defeat his right to retain it, without reference to whether the possession was transferred to the intermediate possessor by the original owner either voluntarily or involuntarily

4. In Portugal the acquirer, in order to retain the property, must have acted in good faith<sup>89</sup> and must have acquired the legal title.<sup>90</sup>

In German,<sup>91</sup> Spanish<sup>92</sup> and Portuguese<sup>93</sup> law, title does not pass after the period of the statute of limitations has expired, unless the acquisition was in good faith. However, in German law an action for unjust enrichment will lie against a gratuitous acquirer.<sup>94</sup> Continental law treats gross negligence as equivalent to bad faith.<sup>95</sup> In French law, in the case of an unauthorized acquisition of land, good faith is not required in order for the acquirer to obtain title after the statute has run for a period of thirty years, but is required at the commencement of the shorter prescriptive period of ten or twenty years, depending on the proximity of the owner's habitation to the situs of the land.<sup>96</sup> In the case of a purchase or gift of personal property from a person who was not the owner, good or bad faith is to be determined at the time of delivery. In English law the element of negligence is excluded when good faith is in issue.<sup>97</sup>

In summary, in most European countries the acquirer in good faith, even without having given value, can retain the property unless it had been lost or stolen. If the property has been lost or stolen, the owner can reclaim it, but when such property has been acquired in good faith at public sale or from a merchant, the owner must reimburse the acquirer. In Anglo-American law, good faith, value and title are

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Sauveplanne, *La protection de l'acquéreur de bonne foi d'objets mobiliers corporel*, 1961 UNIDROIT YEARBOOK 43, 55 n.1.

<sup>86</sup> PORTUGUESE CIVIL CODE art. 518.

<sup>87</sup> *Ibid.*

<sup>88</sup> Note 70 *supra*.

<sup>89</sup> PORTUGUESE CIVIL CODE art. 532.

<sup>90</sup> *Ibid.*

<sup>91</sup> GERMAN CIVIL CODE § 937.

<sup>92</sup> SPANISH CIVIL CODE art. 1955; SPANISH COMMERCIAL CODE art. 85.

<sup>93</sup> PORTUGUESE CIVIL CODE art. 527.

<sup>94</sup> GERMAN CIVIL CODE § 816(1).

<sup>95</sup> GUTTERIDGE, *COMPARATIVE LAW* 97 (1946).

<sup>96</sup> FRENCH CIVIL CODE art. 2265.

<sup>97</sup> GUTTERIDGE, *op. cit. supra* note 95, at 97.

required to protect the acquirer except in special situations such as cases, covered by the Factors Acts,<sup>98</sup> in which an agent is entrusted with goods but without authority to sell unless certain stipulated conditions are observed, usually a minimum price; cases of money<sup>99</sup> or other media of exchange such as negotiable instruments;<sup>100</sup> cases in which a seller has retained title after delivery of goods sold;<sup>101</sup> cases of title fraudulently obtained;<sup>102</sup> and cases of estoppel.<sup>103</sup> In England, an additional exception is the case of sales in public market, unless the property was stolen.<sup>104</sup> Public markets include ordinary stores. It is worth noting that in a careful review of the whole problem by Professor Sauveplanne, the Secretary-General of the International Institute for the Unification of Private Law, it is recommended to the Institute that the rights of acquirers "à titre gratuit" (without giving value) should, if allowed at all, be subject to some limitations.<sup>105</sup> Whether or not the suggestion is adopted by the Institute, the elimination, in almost all civil law systems, of the requirement of giving value, if the acquirer in good faith is to be preferred over the original owner, can have little practical effect, since persons who dispose of property which is not their own or over which the power of disposition is lacking, and who therefore fall under liability to the owner, do not ordinarily dispose of the property unless to their own material advantage; such circumstances are not calculated to stimulate the instinct of generosity. Some of the civil law rules are of ancient origin. The Code of Hammurabi provides in section 9 that a purchaser of a stolen article from a thief must return the property to the true owner and may recover the money paid from what is significantly referred to as the estate of the seller. Section 279 of the same code provides that in a sale at market overt, the former owner must compensate the pur-

<sup>98</sup> The Sale of Goods Act, 1893, 56 & 57 Vict., c.71, §§ 21-25. (Section 21 of this act has been excluded by Hire-Purchase Act 1964, c.64.) On the effect of the Factors Acts see *Prentice v. Page*, 164 Mass. 276, 281 N.E. 279-80 (1895).

<sup>99</sup> 1 Salk. 126 (*nisi prius*, before L. Ch., J. Holt); *Brown v. Perera*, 182 App. Div. 922 (1918), *affirming without opinion*, 176 N.Y. Supp. 215 (App. Div.) (opinion of referee in court below also printed).

<sup>100</sup> *Miller v. Race*, 1 Burr. 452, 97 Eng. Rep. 398 (K.B. 1758); *Grant v. Vaughan*, 3 Burr. 1516, 97 Eng. Rep. 957 (K.B. 1764); UNIFORM NEGOTIABLE INSTRUMENTS LAW § 57; UNIFORM COMMERCIAL CODE § 3-305.

<sup>101</sup> UNIFORM CONDITIONAL SALES ACT § 5.

<sup>102</sup> *Butters v. Haughwout*, 42 Ill. 18 (1866).

<sup>103</sup> See case cited note 60 *supra*.

<sup>104</sup> Statutes cited note 98 *supra*. As to stolen goods see *Walker v. Matthews*, 8 Q.B.D. 109 (1881).

<sup>105</sup> *Unification of Law*, 1961 UNIDROIT YEARBOOK.

chaser as a condition to recovering the property. The Code of Manu, sections 201 and 202, contains similar provisions.

In the case of successive sales of personal property by the same owner to different persons, the first purchaser prevails at common law.<sup>106</sup> In Swiss law, the first to acquire possession prevails.<sup>107</sup> Even though delivery is essential to the passing of title to personal property in German,<sup>108</sup> Swiss<sup>109</sup> and Spanish<sup>110</sup> law, and although in French<sup>111</sup> and Italian<sup>112</sup> law title passes upon the making of an agreement to that effect, the transfer, as a foreign comparatist has pointed out,<sup>113</sup> cannot be compelled until the price has been paid.<sup>114</sup> Thus, the same practical result is reached in French and Italian law as in the law of Germany, Switzerland and Spain. The result is also the same at common law, even in cases in which title has passed, since in case of failure to pay the purchase price, delivery cannot be compelled by the purchaser.

In successive assignments of incorporeal property, French law protects the assignee who first gives notice to the debtor, on the analogy of Article 2279 of the Civil Code. The common law countries are divided. In England the same result is reached as in French law.<sup>115</sup> In the United States, ordinarily the first assignee in time prevails.<sup>116</sup> In the case of transfers of real property, ownership in some civil law jurisdictions depends on registration.<sup>117</sup> In other civil law jurisdictions, as in the United States and in some counties of England, registration merely operates as a bar to rights acquired by third persons, and it is not necessary to the effectiveness of the previous transfer.<sup>118</sup>

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<sup>106</sup> See BROWN, *PERSONAL PROPERTY* 226-32 (2d ed. 1936).

<sup>107</sup> SWISS CIVIL CODE art. 922.

<sup>108</sup> GERMAN CIVIL CODE § 929; GERMAN COMMERCIAL CODE § 366.

<sup>109</sup> SWISS CIVIL CODE art. 922.

<sup>110</sup> SPANISH CIVIL CODE arts. 1095, 1462.

<sup>111</sup> FRENCH CIVIL CODE arts. 1138, 1583. A sale is complete when the parties have agreed on the subject matter and the price. Judgment of Nov. 26, 1962, [1963] *Recueil Dalloz* 644 (Cass. civ. 1re); see FRENCH CIVIL CODE art. 1583.

<sup>112</sup> ITALIAN CIVIL CODE art. 1376.

<sup>113</sup> Puig Brutau, *Realism in Comparative Law*, 3 AM. J. COMP. L. 42, 52 (1954).

<sup>114</sup> FRENCH CIVIL CODE art. 1612; ITALIAN CIVIL CODE art. 1498; SPANISH CIVIL CODE art. 1466.

<sup>115</sup> *Dearle v. Hall*, 3 Russell 1, 38 Eng. Rep. 475 (Ch. 1830).

<sup>116</sup> RESTATEMENT, CONTRACTS, § 173 (1932); *Salem Trust Co. v. Finance Co.*, 264 U.S. 182 (1924).

<sup>117</sup> E.g., AUSTRIAN CIVIL CODE art. 431; GERMAN CIVIL CODE § 873; GERMAN COMMERCIAL CODE §§ 656, 731.

<sup>118</sup> Décret du April 1, 1955, art. 30 (Fr.).

## Rights and Obligations Arising out of Voluntarily Assumed Relations

### *The Enforceability of Promises*

In early Roman law no action would lie on a naked promise. The law required a request, and a promise made in response to the request, in order to emphasize in the mind of the promisor the finality of his engagement and to justify reliance upon the promise by the person to whom it was made. In Roman law, *causa* meant actionability and not something independent of actionability which produces that characteristic.<sup>119</sup> This explains a reference in the Digest which seems to require *causa* apart from the agreement, in the case of innominate contracts in the form of the *stipulatio*. The doctrine of *causa* as a separate element was, it is generally believed, introduced by the glossators.<sup>120</sup> The civil law proceeds on the basis of either of two theories: on the theory of *causa* or on the theory of a promise deliberately made, even without either consideration or *causa*. Gifts, called "donations," are often subject, however, to certain formalities, such as authentication by a notary, which is required in French<sup>121</sup> and German<sup>122</sup> law. Even in the common law it has been stated by no less an authority than Williston that "it may fairly be argued that the fundamental basis of simple contracts historically was action in justifiable reliance on a promise."<sup>123</sup> The requirement of consideration was introduced, on the analogy of a trespass, to overcome procedural difficulties.<sup>124</sup>

Fifoot is of the opinion that the doctrine of *causa* was used in canon law to overcome the rule of classic Roman law that no action would lie on a naked promise; that is, that a promise to be enforceable must have been made with a serious purpose.<sup>125</sup> Benevolence or the discharge of a moral duty would suffice.<sup>126</sup>

In French law, contractual obligations are enforced even though

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<sup>119</sup> BUCKLAND, A TEXTBOOK OF ROMAN LAW 426 (1921).

<sup>120</sup> The word "*causa*" in DIGEST law 7, "*De Pactis*," is interpreted in the Gloss of Accursius to mean cause which makes a promise valid; Gloss of Accursius to DIGEST 42.1.3.1; SOHM, INSTITUTES OF ROMAN LAW 371 (3d ed. Ledlie transl. 1907); see Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 498 (1958).

<sup>121</sup> FRENCH CIVIL CODE art. 931.

<sup>122</sup> GERMAN CIVIL CODE § 518.

<sup>123</sup> 1 WILLISTON, CONTRACTS § 139 (rev. ed. 1937).

<sup>124</sup> See Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53 (1888).

<sup>125</sup> FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 306 (1949).

<sup>126</sup> Decretal, Greg. IX, II.22..4; see ESMELN, ETUDES SUR LES CONTRATS 65.

they are gratuitous, provided that *cause* (French) is present.<sup>127</sup> According to the French comparatist David, *cause* is the reason for incurring the obligation.<sup>128</sup> The *cause* of a promise is the purpose for which the promise was made, rather than the immediate benefit.<sup>129</sup> It includes a desire to confer a gratuitous benefit.<sup>130</sup> In the view of Capitant, *cause* is the end which one proposes to attain by the contract.<sup>131</sup> The French Civil Code enforces promises to perform moral obligations in specific situations: the obligation of parents to establish a son or to endow a daughter; the obligation of an heir to fulfill unenforceable testamentary obligations of his ancestor; the obligation to compensate for an unenforceable injury; or the obligation to pay a debt discharged in bankruptcy or voidable for infancy.<sup>132</sup> In such cases the promise is enforced even in the absence of formalities of execution.

In English law one is bound not because he has made a promise but because he has made a bargain.<sup>133</sup> Corbin has said that the function of courts is "the determination of whether or not there is good reason for enforcing the promise sued on—a question of social policy."<sup>134</sup> The doctrine of *causa* does not exist in Germany,<sup>135</sup> Austria,<sup>136</sup> Portugal<sup>137</sup> or Belgium.<sup>138</sup> In Louisiana both *causa* and consideration are required.<sup>139</sup> In a decision of the Cape Supreme Court of the Union of South Africa, *causa* and consideration were held to be identical; neither is required.<sup>140</sup> Since this rule was established in 1919, it is said that no

<sup>127</sup> Capitant, *De la cause des Obligations*, in 2 COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANCAIS No. 1014 (1923).

<sup>128</sup> Cause is "le motif pour lequel une personne s'engage" (the motive for which one binds himself). DAVID, *MELANGES JACQUES MAURY* 134 (1960). See GORLA, *IL CONTRATTO* (1955).

<sup>129</sup> 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DU DROIT CIVIL FRANCAIS* No. 252 (1954).

<sup>130</sup> Judgement of Aug. 16, 1881, [1882] *Recueil Périodique et Critique* I. 478 (Cass. req.).

<sup>131</sup> Capitant, *supra* note 127, No. 1014.

<sup>132</sup> 7 PLANIOL & RIPERT, *op. cit. supra* note 129, No. 978.

<sup>133</sup> CHESHIRE & FIFOOT, *CONTRACTS* 52-91 (4th ed. 1956).

<sup>134</sup> Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449, 453 (1937).

<sup>135</sup> See GERMAN CIVIL CODE § 305.

<sup>136</sup> See AUSTRIAN CIVIL CODE arts. 865-82.

<sup>137</sup> PORTUGUESE CIVIL CODE art. 643.

<sup>138</sup> See Schiller, *The Counterpart of Consideration in Foreign Legal Systems*, in NEW YORK LAW REVISION COMMISSION REPORT 187 (1936). In Louisiana both cause and consideration are required. See Snelling, *Cause and Consideration in Louisiana*, 8 TUL. L. REV. 178 (1933).

<sup>139</sup> Schiller, *supra* note 138.

<sup>140</sup> In *Conradie v. Rossouw*, [1911] A.C. 279 (Cape Sup. Ct.) *causa* and consideration were held to be identical concepts; both were eliminated from the law of contracts.

prejudice to justice or certainty in the law of contracts is discoverable.<sup>141</sup>

The doctrines of *causa* or consideration, or even the absence of both of these requirements, lead to fairly similar results in the enforcement of promises. There are a growing number of cases in American law in which consideration is dispensed with, such as action in reliance on a promise<sup>142</sup> or the acceptance of consideration of nominal value; a rent of a peppercorn has been held sufficient to raise a use on a bargain and sale deed.<sup>143</sup> Most courts now enforce promises to pay for past benefits conferred at the request of the promisor.<sup>144</sup> The Uniform Commercial Code provides that written and signed offers are binding for a period not exceeding three months, even without consideration.<sup>145</sup> Pound has listed numerous exceptions to the requirement of consideration in equity<sup>146</sup> There are thus a large number of situations in which consideration is not required for the enforcement of promises: trusts,<sup>147</sup> charitable subscriptions,<sup>148</sup> gratuitous promises to convey land followed by possession and improvements,<sup>149</sup> the firm offer,<sup>150</sup> taking of security in the case of negotiable instruments although no value is given,<sup>151</sup> release of claims,<sup>152</sup> promises to pay barred debts,<sup>153</sup> infants' contracts<sup>154</sup> and discharged claims in bankruptcy,<sup>155</sup> inadequate consideration,<sup>156</sup> sealed instruments,<sup>157</sup> and promises reasonably inducing

<sup>141</sup> Millner, *Contrasts in Contract and Tort*, 16 CURRENT LEGAL PROBLEMS 68, 72 (1963).

<sup>142</sup> RESTATEMENT, CONTRACTS § 90 (1932).

<sup>143</sup> *Barker v. Keete*, 1 Free. 249, 2 Ventr. 35, 1 Mod. Rep. 262, 2 Mod. Rep. 249 (K.B. 1678).

<sup>144</sup> See *Webb v. McCowin*, 27 Ala. App. 82, 168 So. 196 (1935) (enforced promise of an annuity to person injured saving promisor). Cf. *Cochran v. Taylor*, 273 N.Y. 172, 7 N.E.2d 89 (1937).

<sup>145</sup> UNIFORM COMMERCIAL CODE § 2-205. See Sharp, *Promises, Mistake and Reciprocity*, 19 U. CHI. L. REV. 286 (1952); Symposium, 41 COLUM. L. REV. 777 (1941).

<sup>146</sup> Pound, *Consideration in Equity*, 13 ILL. L. REV. 667 (1919).

<sup>147</sup> *Id.* at 668-69.

<sup>148</sup> CORBIN, CONTRACTS § 198 (1963).

<sup>149</sup> *Neale v. Neale*, 76 U.S. (9 Wall.) 1 (1869).

<sup>150</sup> UNIFORM COMMERCIAL CODE § 2-205.

<sup>151</sup> *Kelso v. Ellis*, 224 N.Y. 528, 536, 121 N.E. 364, 366 (1918).

<sup>152</sup> *Cairo R.R. v. United States*, 267 U.S. 350 (1925); *Rye v. Phillips*, 203 Minn. 567, 282 N.W. 459 (1938); *Fried v. Fisher*, 328 Pa. 497, 196 Atl. 39 (1938).

<sup>153</sup> *Mascot Oil Co. v. United States*, 42 F.2d 309 (1930), *aff'd*, 282 U.S. 434 (1931).

<sup>154</sup> *Henry v. Root*, 33 N.Y. 526 (1865); RESTATEMENT, CONTRACTS § 89 (1932).

<sup>155</sup> *Zavelo v. Reeves*, 227 U.S. 625 (1913).

<sup>156</sup> *Seymour v. Delancey*, 3 Cow. 445 (N.Y. Ct. Err. 1824).

<sup>157</sup> A seal imports consideration, even since enactment of N.Y. Civil Practice Act § 342 (1934). *Cochran v. Taylor*, 273 N.Y. 172, 7 N.E.2d 89 (1937).

action.<sup>158</sup> An Italian jurist has expressed the opinion that the scope of enforceable promises is larger in the common law than in the civil law, where consideration is not required.<sup>159</sup> The many inroads into the doctrine of consideration justify the expectation that, in the not distant future, a uniform system of enforceable contracts may prevail in most of the commercial countries. "[T]he history of the law of contract throughout the world shows a gradual but steady progress to the moral and economic approach, and recognizing the interest, both individual and social in the performance of promises, deliberately made, merely as such."<sup>160</sup> Lord Denning has said that "the fundamental [principle] of contract, which is that he who makes a promise should keep it . . . is fundamental to all peoples. It is contained in the Torah."<sup>161</sup> Ordinarily, in Anglo-American law the adequacy of the consideration is immaterial, both at common law and in equity.<sup>162</sup> It has been possible to enact a uniform sale of goods act in 1964 at the Hague Conference on the Unification of Law Governing the International Sale of Goods, after deliberations which had continued since 1935. The convention has already been signed by six nations.<sup>163</sup>

### *Negotiations Preliminary to the Formation of the Contract*

#### *Good Faith*

The law has progressed a long way since the fourth century B.C., when a Persian king could describe the Greek market as a place where men might cheat one another under oath. In almost all the world's legal systems, with the exception of Islamic law and the inner Anglo-American common law (as distinguished from equity), much the same standards of good faith are required in contractual negotiations as in other institutions of social control—ethics, morals, and religion. The legal origin of these ethical standards is found in the doctrine of *culpa in contrahendo* of Roman law, which has been perpetuated in the civil law.<sup>164</sup> Fraud may consist in civil law of keeping secret that

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<sup>158</sup> RESTATEMENT, CONTRACTS § 90 (1932) (performance commenced in reliance on a promise).

<sup>159</sup> GORLA, *IL CONTRATTO* (1955).

<sup>160</sup> Pound, *Promise or Bargain?*, 33 TUL. L. REV. 455, 469 (1959).

<sup>161</sup> Lord Denning, *INTERNATIONAL LAWYERS' CONVENTION IN ISRAEL* 58 (1958).

<sup>162</sup> See *Seymour v. Delancey*, 3 Cow. 445 (N.Y. Ct. Err. 1824).

<sup>163</sup> See Tunc, *The Uniform Law on the International Sale of Goods*, 74 YALE L.J. 1409, 1413 (1965).

<sup>164</sup> Pringsheim, *Aequitas und bona fides*, in *LECTURES FOR THE FOURTEENTH CENTENARY OF THE PANDECTS* 183 (1931).

which should be revealed;<sup>165</sup> Ripert uses the striking phrase, "the moralization of contracts."<sup>166</sup> The appropriate criteria have been expressed in formulae which naturally differ from country to country. The German,<sup>167</sup> French,<sup>168</sup> Swiss,<sup>169</sup> Soviet<sup>170</sup> and Austrian<sup>171</sup> codes contain provisions which are broad enough to allow relief in cases in which advantage has been taken of ignorance, inexperience or economic distress. In Italian law, contractual negotiations must conform to the rules of decency,<sup>172</sup> as Del Vecchio has reminded us, quoting Dante, "deceit . . . taints the whole world."<sup>173</sup> In German law the test of good faith is tied to the norm of ordinary usage and to the requirement of absence of extreme disproportion in the exchanges.<sup>174</sup> In Russian law the test is "taking advantage of distress."<sup>175</sup> In French law mistake in value gives rise to rescission only in sales of land,<sup>176</sup> partition of successions<sup>177</sup> or contracts of an infant.<sup>178</sup> Classic Roman law granted the buyer a reduction in price where there were sales of goods of lesser quality than was contemplated.<sup>179</sup> In Spanish<sup>180</sup> and Philippine<sup>181</sup> law rescission is allowed for "insidious machinations." The same general principle of good faith runs throughout the entire gamut of Russian, Scandinavian, Hungarian and civil law, in spite of differences in the formulae in which the concept is expressed and in spite of differences of emphasis. The cases in which these different formulae are applied are almost indistinguishable from one another,

<sup>165</sup> COVIELLO, ITALIAN CIVIL LAW, GENERAL SECTION 394 (2d ed. 1915); CICERO, DE OFFICIIS, bk. III, c. 14-17. On bona fides in canon law see Hildenbrand, *Geschichte der Restimmungen des canonischen Rechts über die bona fides bei der Ersitzung und Klagverjährung*, in 36 ARCHIV. FÜR DIE CIVILISTISCHE PRAXIS 27 (1853).

<sup>166</sup> RIPERT, LA REGLE MORALE DANS LES OBLIGATIONS CIVILES 92-93 (2d ed. 1927).

<sup>167</sup> GERMAN CIVIL CODE § 138.

<sup>168</sup> FRENCH CIVIL CODE art. 1116.

<sup>169</sup> SWISS CIVIL CODE art. 2.

<sup>170</sup> SOVIET CIVIL CODE art. 33 (as interpreted in art. 149).

<sup>171</sup> AUSTRIAN CIVIL CODE art. 879(4).

<sup>172</sup> ITALIAN CIVIL CODE art. 1175.

<sup>173</sup> Del Vecchio, *Truth and Untruth in Morals and Law*, 39 IOWA L. REV. 16, 52 (1953).

<sup>174</sup> GERMAN CIVIL CODE § 138.

<sup>175</sup> SOVIET CIVIL CODE art. 149.

<sup>176</sup> FRENCH CIVIL CODE art. 1674.

<sup>177</sup> FRENCH CIVIL CODE art. 887.

<sup>178</sup> FRENCH CIVIL CODE art. 1305.

<sup>179</sup> BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 211 (2d ed. rev. by Lawson 1965).

<sup>180</sup> SPANISH CIVIL CODE art. 1269.

<sup>181</sup> CIVIL CODE OF THE PHILIPPINES art. 1338 (Garcia y Alba 1952).



and in most instances the same results could have been reached had the formulae of other legal systems been applied.<sup>182</sup>

In the common law, in both England and the United States, full disclosure of all material facts is required in insurance contracts, in all contracts of suretyship and in all dealings between persons in a fiduciary relationship.<sup>183</sup> In some situations, such as dealings between a trustee and a beneficiary, the presence of the confidential relationship imposes the duty of *uberrimae fides*.<sup>184</sup> In other situations, complete good faith is required only in cases arising in equity, which under the common law system means, in substance, cases in which the plaintiff is entitled to specific relief in the form of specific performance or injunctive relief. Thus, there exists in Anglo-American law the anomalous situation that the only circumstances which require complete good faith are suits for specific relief or cases involving a confidential relationship;<sup>185</sup> although everyone agrees that the form of remedy which is available has nothing to do with the relevance of the requirement of good faith to the solution of the controversy and that there is no good reason for confining the application of the requirement of good faith to situations in which a confidential relationship is present.<sup>186</sup> In Islamic law a party who has suffered something to his great disadvantage is nevertheless without legal relief, except against flagrant misrepresentation in a sale.<sup>187</sup> In civil law<sup>188</sup> and Scots law,<sup>189</sup> which is based primarily on civil law but displays the influence of common law doctrine, there is an overriding duty of good faith. The Restatement of Contracts continues the unfortunate doctrine that the remedy for unconscionable conduct is confined to the denial of specific relief, when such relief is requested by the party who has been guilty of unconscionable conduct.<sup>190</sup>

### *Contracts of Adhesion*

Form contracts, or contracts of adhesion, are those contracts presented on a take-it-or-leave-it basis by a person who is in a position (often the result of a partial monopoly) of great economic superiority

<sup>182</sup> See NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* ch. VII (1961).

<sup>183</sup> See CHESHIRE & FIFOOT, *CONTRACTS* 229 (4th ed. 1956).

<sup>184</sup> See SCOTT, *TRUSTS* § 170.25 (2d ed. 1956).

<sup>185</sup> BOGERT, *Confidential Relations and Unenforceable Express Trusts*, 13 *CORNELL L.Q.* 237 (1928).

<sup>186</sup> See CHAFEE, *SOME PROBLEMS OF EQUITY* 30 (1950).

<sup>187</sup> MEDJELLE art. 356.

<sup>188</sup> GERMAN CIVIL CODE §§ 157, 242; FRENCH CIVIL CODE art. 1109.

<sup>189</sup> GLOAG, *CONTRACTS* 229, 302 (2d ed. 1929).

<sup>190</sup> RESTATEMENT, *CONTRACTS* § 367a (1932).

The doctrine of relief from such contracts is far more widely used in civil law than in the inner Anglo-American common law. The doctrine originated in France in 1901.<sup>191</sup> A French jurist, Ripert, explains the doctrine on the ground that consent involves discussion of the terms of a contract, but a contract of adhesion, dictated by superior economic power and with resulting harshness to the adversary party, is not really contractual but is the expression of a "private authority." If there is a will, it is, according to Ripert, "a weak sort of will."<sup>192</sup> Form contracts are dealt with in specific provisions of the Italian Civil Code.<sup>193</sup> One-sided clauses must be separately approved in writing, and the Code gives a list of such clauses.<sup>194</sup> Enlargement of the code provisions by analogy is not allowed.<sup>195</sup> The French decisions confine relief to the elimination of clauses which are found to be unfair. The same limitation is also evident in Italian and Israeli<sup>196</sup> law. The fiction that the party would not have agreed to the clauses if he had known of them seems to underlie both the French and Italian solutions. If a contract was signed without knowing of certain clauses and was prepared by the other, more powerful party, the contract, in other civil law jurisdictions, may be rescinded. In view of the breadth of the Italian statute,<sup>197</sup> it seems probable that the relief will, before long, be extended to cases in which the clauses are known by the party who is in the inferior bargaining position. Contracts of adhesion are usually enforced, although sometimes reluctantly, in Anglo-American law.<sup>198</sup> Relief is occasionally given in equity.<sup>199</sup> It is provided in the Uniform Commercial Code that the court can strike out unconscionable clauses or reject the entire contract. It is stated in the comment to the Code that "the principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."<sup>200</sup> The doctrine has been applied more

<sup>191</sup> SALEILLE, *DECLARATION DE VOLENTE* 129-30 (1901).

<sup>192</sup> RIPERT, *LA REGLE MORALE DANS LES OBLIGATIONS CIVILES* No. 63 (4th ed. 1949).

<sup>193</sup> ITALIAN CIVIL CODE arts. 1341, 1342, 1370.

<sup>194</sup> ITALIAN CIVIL CODE art. 1341.

<sup>195</sup> Gorla, *Form Contracts*, 11 AM. J. COMP. L. 1, 20 (1962).

<sup>196</sup> Statute of Standard Contracts, May 11, 1964 (Israel).

<sup>197</sup> ITALIAN CIVIL CODE art. 1341.

<sup>198</sup> *Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189 (2d Cir. 1955); *Streich v. General Motors Corp.*, 5 Ill. App. 2d 485, 126 N.E.2d 389 (1955).

<sup>199</sup> In *Baedeker & Associates v. Hamtrack State Bank*, 257 Mich. 435, 241 N.W. 249 (1932) specific performance was denied in the case of a contract which was drawn to look like an application for listing but was really a subscription contract.

<sup>200</sup> UNIFORM COMMERCIAL CODE § 2-302, comment. *American Home Improvement Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); see Note, 78 HARV. L. REV. 895 (1965).

restrictively in England, where a court has refused to permit evidence of oral or implied warranties because a fine print provision excluded them.<sup>201</sup>

### *Duress*

In Roman law the doctrine of duress was limited to physical coercion tested by the standard of a person capable of the greatest endurance.<sup>202</sup> In French law the doctrine is broadened so as to apply the test of the degree of pressure which would be effective against a reasonable person, even though the pressure is confined to threats against his person or property.<sup>203</sup> In England physical duress was extended to economic duress in the eighteenth century.<sup>204</sup> In German law the doctrine of duress is tied to the standard of good morals defined in the Civil Code.<sup>205</sup> There is a strict application of the doctrine of economic duress, so that it must threaten the economic existence of the weaker party.<sup>206</sup> The provisions of the German Civil Code which establish the general standards of exploitation of the necessity, thoughtlessness or inexperience of another, so as to produce economic advantage creating a striking disproportion in value of the counter-performance, tie the test of duress to the test of the fair exchange.<sup>207</sup>

### *The Fair Exchange*

In France and Germany condemnation of economic duress is an instrument for insuring a fair exchange of values. The problem of the fair equivalence of the exchanges must be considered in any comparative discussion of the enforceability of promises. The doctrine, under the name of *laesio enormis*, existed in Roman law. In the time of Diocletian the seller of land could rescind the sale if the price was less than half the value. The doctrine was taken into the canon law under the name of the fair exchange. Extreme disproportion in the exchanges justifies rescission in the law of Hungary<sup>208</sup> and Poland.<sup>209</sup> In French law objective disproportion, without fault or exploitation, has no effect

<sup>201</sup> *L'Estrange v. F. Graucob, Ltd.*, [1934] 2 K.B. 394.

<sup>202</sup> See Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 362 (1937).

<sup>203</sup> FRENCH CIVIL CODE art. 1112.

<sup>204</sup> *Astley v. Reynolds*, 2 Strange 915, 93 Eng. Rep. 939 (K.B. 1732); see Dawson, *Economic Duress: An Essay in Perspective*, 45 MICH. L. REV. 253, 256 (1947).

<sup>205</sup> GERMAN CIVIL CODE §§ 123, 138 (applied to requirement contracts).

<sup>206</sup> See Dawson, *Economic Duress*, 12 TUL. L. REV. 42, 62 (1937).

<sup>207</sup> GERMAN CIVIL CODE § 138.

<sup>208</sup> Case No. 7428 Maganjogi Dontvenytar [M.D.] (1932); Case No. 2044 M.D. (1932); Hungarian Civil Code of 1928 (unenacted) art. 1002.

<sup>209</sup> POLISH CIVIL CODE art. 42.

on ordinary contracts.<sup>210</sup> In Germany a price-value differential of at least one-half is utilized as a measure of lack of fairness, but the courts have applied the standard of the ordinary market price when such a criterion is available.<sup>211</sup> The doctrine applies to sales of either goods or immovables and, when applicable, renders the contract void. In French law the test of the fair exchange is confined to suits for partition of succession,<sup>212</sup> suits by minors<sup>213</sup> and suits for rescission of sales of land brought by the seller,<sup>214</sup> as in Roman law, and is fixed at a mathematical ratio of five-twelfths of the value of the counter-performance. In German law duress is available to either the seller or buyer.

In the United States, where the courts are less concerned with a fair equivalence, the factor of economic compulsion assumes more importance than in the civil law. In equity inadequacy of consideration is usually deemed insufficient in itself for denying specific performance, but it has been made a defense in suits for specific relief by statute in California, Montana, North Dakota and Georgia. In most American jurisdictions gross inadequacy of consideration raises a presumption of fraud, especially when coupled with weakness of bargaining position. In California the ratio has been deemed unconscionable if the value is not more than two-thirds of the price.<sup>215</sup> Under the Uniform Commercial Code, it has been held that a contract is unconscionable where the value of goods or services is less than half the cost.<sup>216</sup> It has been suggested that the Uniform Commercial Code be used as a basis for the extension of this doctrine to other branches of law.

Whenever an unfair bargain has been made by reason of trickery, failure to disclose, superiority of economic position or actual duress, and a gross inadequacy in the value of the exchanges has resulted, most legal systems, with the exception of the inner Anglo-American common law and Islamic law, usually give relief to the weaker party to

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<sup>210</sup> Judgment of Dec. 20, 1952, [1953] *Recueil Périodique et Critique* I. 95, [1953] *Recueil Sirey* I. 101 (Cass. civ.).

<sup>211</sup> See Dawson, *supra* note 206, at 57.

<sup>212</sup> FRENCH CIVIL CODE arts. 887, 1079.

<sup>213</sup> FRENCH CIVIL CODE art. 1305.

<sup>214</sup> FRENCH CIVIL CODE art. 1674.

<sup>215</sup> *Comblith v. Valentine*, 211 Cal. 243, 294 Pac. 1065 (1930) suggests that a value of two-thirds of the price is an unconscionable ratio. Von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009, 1066, n.234 (1959); see *McDermott v. Lindquist*, 66 Colo. 88, 179 Pac. 147 (1919) (contract made under pressure).

<sup>216</sup> *American Home Improvement Inc. v. MacIver*, 105 N.H. 435, 201 A.2d 886 (1964); see Note, 78 HARV. L. REV. 895 (1965).

the transaction. Essentially the same standards of decent and honorable conduct are imposed in most of the legal systems of the world.

### *Implied Warranty*

Related to the requirement of disclosure in good faith is the doctrine of implied warranty in sales of goods. In Roman law, even after the end of the Republic, a seller was liable only for fraud or express warranty "Roman law, like other systems, began with the principle that no liability attached to the seller for defects in the thing sold, whether or not they were noticeable at the time of the sale; the buyer bought the thing 'as it was.'"<sup>217</sup> Even fraudulent concealment did not make the seller liable until the end of the Republic. Cicero first raised the question of good faith in contracting in his discussion of the case of a corn merchant who had observed other ships sailing with shipments of corn for a beleaguered city; should he, before selling his cargo, impart his information about other shipments approaching the city, or keep the fact to himself and sell his cargo at the prevailing famine price? Two Stoic philosophers reached contrary opinions.<sup>218</sup> Cicero felt that it was the moral duty of the seller of a house infested with vermin to disclose the fact to his prospective buyer. It had been law since the Twelve Tables that if a seller of immovables makes a formal oral declaration which is untrue he must pay a double penalty.<sup>219</sup> From the beginning of the Empire to the end of the classical period, in the third century, a seller was liable for non-disclosure of legal defects, such as the existence of a public tax or a private annual toll, which were known to the seller and affected the property.<sup>220</sup> Where the defect

<sup>217</sup> BUCKLAND, *THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW* 272 (1931); JOLOWICZ, *HISTORICAL INTRODUCTION TO ROMAN LAW* 307 (2d ed. 1961); Rabel, *The Nature of Warranty of Quality*, 24 *TUL. L. REV.* 273 (1950).

<sup>218</sup> CICERO, *De Officiis* iii. 50. See STEIN, *FAULT IN THE FORMATION OF CONTRACT IN ROMAN AND SCOTS LAW* (1958). The seller was liable for non-disclosure of legal defects, e.g., servitudes. Beseler, *DE JURE CIVILI TULLIO DICE AD NATURAM RECOCANDO* 324-29 (1931). There was therefore a liability on the seller for non-disclosure of legal defects. In classical law, from the beginning of the Empire to 235 A.D., there was the same rule, DIGEST 19.1.21, 19.1.41, failure to inform a buyer of a public tax or of a private annual toll of which the seller knew. In the case of movables, failure to declare specified faults (in sales of slaves or cattle) whether known to the seller or not, made him liable; applied only to sales in the markets (Aediles' Edict). In the law of Justinian, the Aedilian Edict was extended to all sales of movables, by the compilers. See DIGEST 50.16.195.3. There is no authentic text, according to STEIN, *op. cit. supra* at 54, which applies to immovables. The references are probably, according to Stein, spurious. Also in the law of Justinian, cases in which the classical law gave the buyer no remedy were covered by an enlarged concept of error in substantia. See DE ZULUETA, *THE ROMAN LAW OF SALE* 26 (1945).

<sup>219</sup> DIGEST 9.1.1.1.

<sup>220</sup> STEIN, *op. cit. supra* note 218, at 54.

was unknown to the seller, his liability was at first limited to specific categories of property, such as slaves or cattle, which were sold in markets. In the law of Justinian the liability was extended to all sales of movable property. It is thought that there is no authentic text applying to immovables, and the references to such liability are probably interpolations by the compilers. An action could be brought for rescission for defects known to the seller, in *actio redhibitoria*, or for a rebate in the price, in the *actio quanti minoris*.

*Caveat emptor* was never a part of the civil law.<sup>221</sup> In that legal system the basic doctrine was responsibility for defects.

In voluntary and mutual transactions those who deal with each other owe each other sincerity, so that they may understand to what they have pledged themselves, the fidelity of execution and all that which may result from such a transaction. So the seller must declare truthfully the quality of his wares.<sup>222</sup>

The French Civil Code provides that a vendor warrants against hidden defects which make the thing sold unfit for the intended use or which would have caused the purchaser to reject the sale.<sup>223</sup> The German Civil Code contains similar provisions.<sup>224</sup> Although the view is held by some writers that delivery fulfills the seller's obligations,<sup>225</sup> the European codes generally provide for rescission for defects which defeat the contemplated use.<sup>226</sup> Rescission is allowed for absence of fitness for the usual or intended use, regardless of the seller's knowledge or ignorance of the defect, in French,<sup>227</sup> German,<sup>228</sup> Italian,<sup>229</sup> Swiss,<sup>230</sup> Scandinavian,<sup>231</sup> Austrian<sup>232</sup> and Brazilian<sup>233</sup> law.

In the common law the approach to the problem of responsibility on the part of the seller was precisely the opposite, and the doctrine which later came to be known as *caveat emptor* prevailed, relieving the seller except for fraudulent representations. Implied warranties

<sup>221</sup> *Id.* at 52-53.

<sup>222</sup> DOMAT, *THE CIVIL LAW IN ITS NATURAL ORDER* 11 (Cushing ed. 1853).

<sup>223</sup> FRENCH CIVIL CODE art. 1641.

<sup>224</sup> GERMAN CIVIL CODE § 459.

<sup>225</sup> ENNECCERUS-LEHMAN, *RECHT DER SCHULDVERHALTNESSE* § 1121.

<sup>226</sup> AUSTRIAN CIVIL CODE arts. 922, 932; BRAZILIAN CIVIL CODE art. 1102; GERMAN CIVIL CODE § 459; FRENCH CIVIL CODE art. 1643.

<sup>227</sup> FRENCH CIVIL CODE arts. 1603, 1643.

<sup>228</sup> GERMAN CIVIL CODE § 459(2).

<sup>229</sup> ITALIAN CIVIL CODE art. 1492.

<sup>230</sup> CODE DES OBLIGATIONS art. 107 (Switzerland 1937) [hereinafter cited as SWISS CODE OF OBLIGATIONS].

<sup>231</sup> SCANDINAVIAN SALES LAW § 43(3).

<sup>232</sup> AUSTRIAN CIVIL CODE arts. 922, 932 (second sentence).

<sup>233</sup> BRAZILIAN CIVIL CODE art. 1102.

began to be recognized in England early in the seventeenth century. Since then, the development of the action in *assumpsit* has provided a remedy for breach of implied warranties to a wide extent, although perhaps not as widely as in some of the civil law countries.<sup>234</sup> The Uniform Commercial Code provides in section 2-314 for implied warranty of fitness for ordinary purposes and in section 2-315 for particular purposes.

In Roman law there was no implied warranty of generic, that is, non-specific goods. This was also true in common law.<sup>235</sup> In European law there is still some distinction between sales of specific and generic goods. In the case of generic goods there is no implied warranty, but a process of assimilation has been noted by Kessler.<sup>236</sup>

"Behind the bewildering and frequently conflicting technical details, a tendency towards convergence in the treatment of latent defects of quality is clearly visible."<sup>237</sup> The civil law and the common law agree in substance on the test of responsibility for quality: fitness for ordinary purposes and for the particular purpose envisaged by the buyer.

### *The Effect of Unilateral Mistake*

In Roman law *error in substantia* was exactly what the expression means literally; error as to the material of which the object was composed. The Roman doctrine of mistake proceeded on the assumption that there are inherent qualities of things which determine their identity, and error was not material unless it involved the nature of the thing.<sup>238</sup> Pothier, whose studies in Roman law became, thirty-three years after his death, the basis of the Napoleonic Code, enlarged the Roman doctrine to include the subjective criterion of substance as a

<sup>234</sup> See Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936).

<sup>235</sup> See Le Viness, *Caveat Emptor versus Caveat Venditor*, 7 MD. L. REV. 177, 182 (1943).

<sup>236</sup> Kessler, *Protection of the Consumer Under Modern Sales Law*, 74 YALE L.J. 262, 266 (1964); GERMAN COMMERCIAL CODE § 378; see 86 Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 90 (1914); UNIFORM COMMERCIAL CODE § 2-601; UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS art. 33. On the English law of warranty of quality see Rabel, *The Nature of Warranty of Quality*, 24 TUL. L. REV. 473 (1950); 15 MODERN L. REV. 425 (1952); 16 MODERN L. REV. 174 (1953).

<sup>237</sup> Kessler, *supra* note 236, at 269.

<sup>238</sup> Silving, *The Unknown and the Unknowable in Law*, 35 CALIF. L. REV. 352 (1947); SOKOLOWSKI, *DIE PHILOSOPHIE IM PRIVETRECHT* 238 (1902). Error in a quality of the object of the contract was not a ground for rescission because it was not regarded as preventing a meeting of the wills. BUCKLAND, McNAIR & LAWSON, *ROMAN LAW AND COMMON LAW* 200 (2d ed. 1952).

quality of the object considered essential by the parties to the contract, even though not affecting the identity of the subject matter.<sup>239</sup>

The conceptual approach to the validity of bilateral, or synallagmatic, contracts is precisely opposite in civil and common law. Until about a hundred years ago the subjective test of contractual intent prevailed in England. The objective intent has found a somewhat fortuitous anchorage in American law from the fact that the foremost exponent of the theory, Professor Williston, was the principal reporter for the Restatement of Contracts of 1932, in which the primacy of the objective test found authoritative expression. As Williston himself has pointed out, "results under the subjective theory of contractual acts, where great importance is placed upon the meeting of the minds of the parties, will be materially different from results under the objective theory, which emphasizes their expressions."<sup>240</sup> In the common law rescission for mutual mistake is allowed only where both parties were mistaken concerning an essential fact, the existence of which was assumed by both parties as the basis for contracting. What is frequently overlooked is that the fact that the party against whom rescission is requested was also mistaken has no bearing on the right of the mistaken party to rescind. The principal object in contracting is rarely the same on both sides, and the mistake will almost always be harmful to only one of the parties, that is, the one who for that reason asks for rescission. A vendor is not harmed by the mistaken belief that the land he is selling has a gold mine in it, and the right of the vendor to rescind, if he wished to do so, has no bearing on the right of the buyer, the only one who has been harmed by the mistake, to do so. Rescission is allowed for unilateral mistake only when the mistake was known to or recognizable by the other party to the contract.

French law starts with the basic principle that "there is no valid consent if consent was given by error."<sup>241</sup> Predominating effect is given to the subjective intent on the basic principle that the formation of a contract rests primarily on the actual intention of the parties;<sup>242</sup> a contract is voidable by one who has been mistaken about a matter

<sup>239</sup> "Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject, which the parties have principally in contemplation, and which makes the substance of it." POTHIER, *TRAITÉ DES OBLIGATIONS* 10 (Evans transl. 1826). POTHIER, *TREATISES ON CIVIL AND CRIMINAL PROCEDURE* 312 (1809), published posthumously, advocated the extension of relief in all cases of lesion, or serious harm. This suggestion was not accepted by the codifiers.

<sup>240</sup> Williston, unsigned note, 35 *HARV. L. REV.* 757, 758 (1922).

<sup>241</sup> FRENCH CIVIL CODE art. 1109.

<sup>242</sup> 6 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DU DROIT CIVIL FRANÇAIS* No. 103 (1952).



which was an inducing factor in contracting or in incorporating an important provision. This principle has been described by Planiol as "the source of assuring a minimum of commutative justice in agreements."<sup>243</sup> The law protects an injured party when the contract becomes relatively useless to him because of his error. In Article 1110 of the French Civil Code, "substance" takes the meaning not only of qualities of the object which determine its category, mistake as to which would prevent the formation of any contract at all, but also of substantial qualities of the object, mistake as to which would not prevent the contract from coming into existence.<sup>244</sup> Substance means not only the matter of the object but also its qualities if they are envisaged as of decisive importance. Article 1131 of the French Civil Code enlarged Pothier's definition of error by providing that an obligation based on a false *cause* is void. The French doctrine of *cause* is inseparably related to error in contracting, since contracts are frequently annulled where there was only error in motive or as to the effect of the contract: for example, a contract to make good damage for which the promisor erroneously believed that he was responsible would be annulled.<sup>245</sup> A clear case of error in motive is a contract by a consumer to pay for a long electric connection, not knowing that a shorter connection is available.<sup>246</sup>

The upshot of the historical development of the theory of contractual obligation in the two master systems is that their conceptual approach to the validity of bilateral, or synallagmatic, contracts is precisely opposite. The common law is firmly committed to the principle that contractual responsibility is to be determined according to the outward expression of intent.<sup>247</sup> This objective test requires en-

<sup>243</sup> *Id.* No. 243, at 303.

<sup>244</sup> GABBA, *Contributo allo dottrina dell'errore in diritto civile italiano*, GIURISPRUDENZA ITALIANA col. 677 (1900). The first paragraph of Article 1110 of the Italian Civil Code incorporates the same provision that appears in Article 1110 of the French Civil Code.

<sup>245</sup> Judgment of July 1, 1924, [1926] Recueil Périodique et Critique I. 27 (Cass. req.).

<sup>246</sup> Judgment of Jan. 19, 1925, [1925] Recueil Général de Lois et des Arrêts I. 101, [1925] Dalloz Hebdomadaire 77 (Cass. req.). *Accord*, Judgment of Nov. 17, 1930, [1932] Recueil Général de Lois et des Arrêts I. 17, [1931] Dalloz Hebdomadaire 92 (Cass. civ.) (agreement for settlement of an inheritance rescinded because plaintiff was ignorant of a will in his favor). In [1905] Recueil Général de Lois et des Arrêts I. 212 rescission was allowed of a contract of sale of a patented drug in ignorance of the fact that the defendant's patent had expired. Errors of law are included by implication in art. 1110 of the French Civil Code. See Gorphe, *Le Principe de la bonne foi* (Thèse Paris 1928).

<sup>247</sup> Learned Hand, J., in *Hotchkiss v. National City Bank*, 200 Fed. 287, 293 (S.D.N.Y. 1911) stated: "A contract has, strictly speaking, nothing to do with the

forcement even in cases of unilateral mistake if the mistake was not recognizable, and even if the unilateral mistake was recognizable, enforcement is required, unless it was a mistake in respect to basic presuppositions which would have justified rescission if the mistake had been mutual. Even where the other party had knowledge of the mistake, a large and possibly prevailing body of authority denies relief if the mistake was due to negligence.<sup>248</sup> Since mistake is usually due to negligence, this qualification precludes rescission in almost all cases of unilateral mistake, although some cases, without stressing the point, have allowed rescission even where negligence was present.<sup>249</sup> Relief even for mutual mistake is rejected in English law.<sup>250</sup>

In the legal systems of the countries of continental Europe no distinction is made between mutual and unilateral mistake.<sup>251</sup> In all civil law systems, except the Portuguese,<sup>252</sup> the test of enforceability is the subjective intent of the parties. But in order to preclude capricious rescission, there is, in most civil law countries, a requirement that the mistake, to justify rescission, must have been recognizable.<sup>253</sup> There are various tests of recognizability. Even in the common law, unilateral mistake is ground for rescission under many circumstances

personal, or individual, intent of the parties." Holmes, J., in *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N.E. 747, 751 (1888) stated: "Assent, in the sense of the law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words." WILLISTON, *CONTRACTS* § 20, at 35 (rev. ed. 1957) states: "The fact that the manifestation was made under a mistake will not prevent the formation of the contract."

<sup>248</sup> Abbott, *Mistake of Fact as a Ground for Affirmative Equitable Relief*, 23 HARV. L. REV. 608, 617 (1910); *Cleaveland v. Richardson*, 132 U.S. 318 (1889); *Steinmeyer v. Schroepel*, 226 Ill. 9, 80 N.E. 564 (1907); *Grant Marble Co. v. Abbot*, 142 Wis. 279, 124 N.W. 264 (1910); *Durkee v. Durkee*, 59 Vt. 70, 8 Atl. 490 (1887); see *Williams v. Spurr*, 24 Mich. 335, 350 (1872); *Ricketts v. Pennsylvania R.R.*, 153 F.2d 757, 765 (2d Cir. 1946); *Ashworth v. Charlesworth*, 119 Utah 650, 231 P.2d 724, 727 (1951). Williston, *op. cit. supra* note 247, § 1577 would bar rescission where the plaintiff was negligent. See Comment, 17 U. CHI. L. REV. 725, 729 n.25 (1950).

<sup>249</sup> 3 CORBIN, *CONTRACTS* § 606 n.2 (1963). *Sawyer v. Mid-Continental Petroleum Corp.*, 236 F.2d 518, 521 (10th Cir. 1956); *Rushlight Automatic Sprinkler Co. v. City of Portland*, 189 Ore. 194, 219 P.2d 732 (1950). Patterson, *Equitable Relief for Unilateral Mistake*, 28 COLUM. L. REV. 859, 885 (1928) feels that negligence is really irrelevant.

<sup>250</sup> See *Lawson, Error in Substantia*, 52 L.Q. REV. 79, 97 (1936); *Smith v. Hughes*, L.R. 6 Q.B. 597 (1871).

<sup>251</sup> "The distinction between unilateral and bilateral mistakes is entirely foreign to the Roman and civil law." ARMINJON, VON NOLDE & WOLFF, *TRAITÉ DE DROIT COMPARÉ* civil No. 13 (1950). Thayer, *Unilateral Mistake and Unjust Enrichment as a Ground for the Avoidance of Legal Transactions*, HARVARD LEGAL ESSAYS 467 (1934).

<sup>252</sup> See PORTUGUESE CIVIL CODE arts. 659-60.

<sup>253</sup> Meynial, Book Review of SALLEILLES, *DE LA DECLARATION DE LA VOLONTÉ*, in 1 REVUE TRIMESTRIELLE DE DROIT CIVIL 545, 568 (1902). The reviewer points out that in French law the defendant must have "soupçon" (suspicion) to avoid sanctioning pure individual caprice, and leaving the contractor at the mercy of the declarant.

if the mistake was recognizable.<sup>254</sup> It cannot be questioned that the subjective approach results in the allowance of rescission in cases of unilateral mistake to a considerably greater extent than in Anglo-American common law, where the objective test prevails. This is largely due to the fact that the basic presupposition test of the common law requires that the mistake must concern a fundamental expectation of the contracting party. Under the test of recognizability in several civil law countries, the nature of excusable error is determined by objective standards, which allow rescission only for mistake in matters which would ordinarily be regarded, by reasonable standards, as essential in business dealings;<sup>255</sup> these standards bring about results closely similar to those reached by the objective test of common law. As Corbin has pointed out, unless the mistake concerns a matter which would be regarded as essential by a man who is reasonable, the other party would not be likely to know about it.<sup>256</sup>

In actual practice, the requirement of recognizability goes far to reduce the difference in result produced by the seemingly irreconcilable differences between the objective and subjective approaches to contractual obligation. The difference is not one of generically different concepts but of divergent views as to the application of concepts which are fairly closely related. There is no difference in result between civil law and the inner system of equity in Anglo-American law; both systems allow relief for unilateral mistake with the same liberality, except that equity in Anglo-American law confines relief to the denial of specific performance against the party who was mistaken.<sup>257</sup>

<sup>254</sup> *Brunzell Constr. Co. v. Weisbrod, Inc.*, 34 Cal. App. 2d 278, 285 P.2d 989 (1955); 5 WILLISTON, *op. cit. supra* note 247, §§ 1573, 1557 n.2. "[T]he mistake, though unilateral, makes enforcement unjust." 3 CORBIN, *CONTRACTS* § 610, at 695 (1960). *ARMINJON, VON NOLDE & WOLFF, op. cit. supra* note 251, at 445.

<sup>255</sup> GERMAN CIVIL CODE § 119(2); SWISS CODE OF OBLIGATIONS art. 24; HUNGARIAN CIVIL CODE OF 1928 (unenacted) art. 1002; POLISH CIVIL CODE art. 37. In Polish law the test of matters which would be regarded as decisive in ordinary business dealings is combined with the test of recognizability.

<sup>256</sup> 4 CORBIN, *CONTRACTS* § 906 (1960).

<sup>257</sup> CHAFEE, *SOME PROBLEMS OF EQUITY* 26 (1950). "[I]t is well known that some types of mistake are probably not serious enough to offset an agreement although they make equity decline to enforce it." For a collection of cases see Newman, *op. cit. supra* note 182, at 119 n.11. In *Mansell v. Lord Lumber & Fuel Co.*, 348 Ill. 140, 180 N.E. 774 (1932) the vendor by mistake failed to provide in the contract that the conveyance was subject to unpaid installments of assessments for improvements. Although the court denied specific performance at the suit of the purchaser, rescission was also denied even though the purchaser knew that the vendor thought the contract contained such a provision. See *Burkhalter v. Jones*, 32 Kan. 5, 3 Pac. 559 (1884); *Mansfield v. Sherman*, 81 Me. 365, 17 Atl. 300 (1889); *Day v. Wells*, 30 Beav. 220, 54 Eng. Rep. 872 (Rolls Ct. 1861), (per Sir John Romilly, M.R.). For collection of cases see 3 CORBIN, *CONTRACTS*

In equity specific performance will be denied in cases of unilateral mistake even due to the negligence of the defendant.<sup>258</sup> The only important impediment to the complete reconciliation of the treatment of unilateral mistake is the failure of the inner Anglo-American common law to receive the equitable test of excusable error, which is received throughout the civil law world with few exceptions. The lag between the Anglo-American legal system and the civil law in the allowance of relief for unilateral mistake is due to the failure of the inner common law system to receive the principles of equity

French law requires that a mistake of motive may entail the avoidance of a contract provided the defendant was aware or should have been aware of the plaintiff's motive in contracting and provided the defendant knew or should have known that the motive was of decisive importance to the party who was mistaken. This requirement is clearly a different test of recognizability than the requirement in other European systems that the mistake must have been mutual or known to the other party or recognizable by him. In Switzerland, although Article 24 of the Swiss Code of Obligations states that error in motive is not essential error, the decisions of the Federal Tribunal have permitted rescission for error of motive.<sup>259</sup> In Austrian law, a 1917 amendment to Article 871 of the Civil Code provides for rescission for mistake in an essential quality when the intent was clearly expressed, but jurisprudence has enlarged the effect of the amendment to include error of a less direct sort. The unenacted Hungarian Civil Code of 1928, which was nevertheless followed by the courts up to the enactment of a Soviet Code in 1959, has been enlarged by judicial decision as to the scope of excusable error.<sup>260</sup>

§ 612 (1960). In *Missouri River, F.S. & G.R.R. v. Brickley*, 21 Kan. 275 (1878) specific performance was denied for non-disclosure of a deposit of coal known to the purchaser.

<sup>258</sup> 3 CORBIN, CONTRACTS § 612 (1960); see POMEROY, EQUITY JURISPRUDENCE § 868 (5th ed. 1941). The cases are usually such that considerable hardship would result from specific performance.

<sup>259</sup> *Oehrli v. Graf-Oehrli*, 43 Arrêts du Tribunal Fédéral Suisse, Recueil Officiel [ATF] II. 579, [1918] Journal des Tribunaux [J. Trib.] 610 (1917); 47 ATF II. 86, [1921] J. Trib. 423 (1921); *Hagler-Rickli v. Jaggi S.A.*, 48 ATF II. 236, [1922] J. Trib. 488 (1922); 53 ATF II. 35, [1927] J. Trib. 331 (1927); see *Arnould freres v. Nussberger*, 50 ATF II. 313 (1924); 55 ATF II. 184, [1930] J. Trib. 86 (1929); *Kuhn et consorts v. Klesel et consorts*, 43 ATF II. 775 (1917). See also *Applications Electriques Frigidares S.A. v. Maurer*, 57 ATF II. 284, [1932] J. Trib. 87 (1931), where the seller should have taken into account the fact that the length of the frigidaire was an essential element, as it was too long to fit into the intended place; *Pletscher v. Geiser*, 80 ATF II. 152, [1955] J. Trib. 130 (1955); *Cuenod, Delimitation du domaine de l'erreur dans les contrats en droit Suisse de obligation* (Thèse Lausanne 1941).

<sup>260</sup> No. 18, XIV B Sz (Feb. 9, 1932). Negligence does not bar rescission in Hun-

The German test of "Verkehranschauung," or the business point of view,<sup>261</sup> the Swiss test of commercial loyalty,<sup>262</sup> the Italian test of mistake which could have been detected by a person using ordinary diligence,<sup>263</sup> the Polish test of what would be regarded as decisive under normal circumstances,<sup>264</sup> and the Hungarian test of what is regarded by general belief as important<sup>265</sup> all establish very similar criteria of the kind of mistake for which rescission will be allowed. Even the French subjective test of suspicion of the motive in contracting reaches results not very unlike those which are produced by the objective tests, probably for the reason pointed out by Corbin. The decisions of the German Reichsgericht, which originally insisted on a rigid interpretation of the test of ordinary business usage in determining the materiality of the error, have shown a clear tendency to modify the objective test of recognizability so as to include error in what are called by the courts "neutral" characteristics of the subject matter.<sup>266</sup> This approaches the wider French test which allows rescission in cases of mere suspicion of the adversary's motive in entering into the contract. In accordance with what appears to be an inevitable progression across the entire civil law in the concept of substantial error, the Reichsgericht developed a formula that characteristics include not only physical characteristics but also qualities, whether factual or legal, of the subject matter of the contract affecting its value according to the prevailing opinion in the market and because of the normal duration of those qualities.<sup>267</sup> According to Staudinger, however, the formula of the court has not clearly discarded the test of the qualities which tend to identify the object.<sup>268</sup> The bewildering diversity of approach to the problem of what effect is to be given to unilateral mistake should not be allowed to obscure the underlying concept of good faith which has burst the restraints, established from time to

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ganan law. [1927] BJ Bl. 4 (Jan. 5, 1927). Case No. 3795 M.D. (1902); Case No. 128 M.D. (1908); Case No. 227 M.D. (1933); Case No. 2044 M.D. (1932); Case No. 6003 M.D. (1931).

<sup>261</sup> GERMAN CIVIL CODE §§ 119(2), 157.

<sup>262</sup> SWISS CODE OF OBLIGATIONS art. 24.

<sup>263</sup> ITALIAN CIVIL CODE art. 1431.

<sup>264</sup> POLISH CIVIL CODE art. 37.

<sup>265</sup> HUNGARIAN CIVIL CODE OF 1928 (unenacted) art. 1002.

<sup>266</sup> 161 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 193 (1939); 95 RGZ 60 (1918); 64 RGZ 266, 268 (1906). The name of the court is now the Bundesgerichtshof. STAUDINGER, KOMMENTAR ZUM BÜRGERLICHES GESETZBUCH 636 (1957). Cf., [1912] Juristische Wochenschrift [J.W.] No. 2, at 850.

<sup>267</sup> 64 RGZ 266, 268 (1906).

<sup>268</sup> STAUDINGER, KOMMENTAR ZUM BÜRGERLICHES GESETZBUCH 636 (1957).

time in different parts of the world, on the application of the equitable concept.

### *Reliance Interest Damages*

The main obstacle to the reconciliation of the solutions which have been reached in common law and civil law lies in the difference in the measure of damages for rescission. In the legal systems of the countries of continental Europe, where no distinction is made between mutual and unilateral mistake, relief is granted in a wide range of situations, under suitable safeguards to protect the adversary party against damage arising out of his reliance on the outward manifestation of intent. The civil law treatment of mistake apportions the loss. The person seeking relief, while not defeated by a change of position of the adversary party, must compensate him for any actual loss but not for anticipated profits. The recognition of this right to damages for actual injury is largely the bridge between the equity of the mistaken party to be relieved from responsibility for the consequences of his uninformed intent to contract and the equity of the party who relied on the contract.

In Swiss law, damages to cover the actual loss due to the reliance interest, "*Vertrauensinteresse*," are recoverable,<sup>269</sup> but the court in its discretion may award greater damages.<sup>270</sup> In German<sup>271</sup> and Greek<sup>272</sup> law, no greater amount can be claimed for the reliance interest than the value of the benefit which would have been derived from the contract as it had been made. In Greek,<sup>273</sup> Italian<sup>274</sup> and Swiss<sup>275</sup> law, the other party may accept the expression of intent as it was understood by the party who was mistaken; this is also true in Anglo-American equity<sup>276</sup>

In the common law there is no intermediate remedy to cover the reliance interest. The Restatement of Contracts provides that "a transaction . . . is voidable except where it is possible by compensation to the party injured by the mistake to put him in as good a position as if the transaction had been what he supposed it to be, and such

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<sup>269</sup> SWISS CODE OF OBLIGATIONS art. 26.

<sup>270</sup> Grandchamp v. Juguenin, 64 ATF II. 9, [1939] J. Trib. 158 (1938).

<sup>271</sup> GERMAN CIVIL CODE § 122.

<sup>272</sup> CIVIL CODE art. 145 (Greece 1940) [hereinafter cited as GREEK CIVIL CODE].

<sup>273</sup> GREEK CIVIL CODE art. 144.

<sup>274</sup> ITALIAN CIVIL CODE art. 1110.

<sup>275</sup> SWISS CODE OF OBLIGATIONS art. 25.

<sup>276</sup> Paget v. Marshall, 28 Ch. D. 255 (1885); 2 CHITTY, PLEADING § 237 (1809); SNELL, EQUITY 569 (1878).

compensation is given."<sup>277</sup> The Restatement further provides that "the value of the promised performance is always one of the chief elements in fixing the amount that may be recovered as damages. The gains referred to in the present Section are the prospective gross receipts"<sup>278</sup> When the parties can be placed in their former positions and when the mistake is clearly established and convincingly shown, the instrument will be cancelled or rescinded for the mistake of one of the parties. It has been stated in a Minnesota case that

the weight of authority is to the effect that a court, in the exercise of its equitable powers, may cancel a contract at the instance of a party who proves that he was mistaken as to a material element of the contract at the time he made it, if he acts promptly and the contract can be rescinded without prejudice to the other party; that is, if both parties can be placed in *status quo*. This on the ground that the parties did not have the same subject-matter in mind in making the contract, and did not in fact come to an agreement in respect to the same thing.<sup>279</sup>

The reliance interest doctrine is incorporated in section 3408 of the California Civil Code. It is worth noting that both Texas,<sup>280</sup> where the principle is recognized, and California<sup>281</sup> show strong traces of the influence of the civil law. Thus in the common law, rescission is allowed only in the infrequent cases in which the *status quo* can be restored without paying damages for the reliance interest of the defendant, that is, by restoring the consideration received by the party who was in error; and therefore any slight change in the position of the defendant bars rescission for any kind of mistake. This qualification to the right to rescind for unilateral mistake is absent in the law of France,<sup>282</sup> Germany,<sup>283</sup> Switzerland,<sup>284</sup> Italy,<sup>285</sup> Austria,<sup>286</sup> Argentina,<sup>287</sup>

<sup>277</sup> RESTATEMENT, CONTRACTS § 502(c) (1932).

<sup>278</sup> *Id.* § 329, comment *b*.

<sup>279</sup> *Olson v. Shepard*, 165 Minn. 433, 436, 206 N.W. 711, 712 (1926). See *Fehlberg v. Cosine*, 16 R.I. 162, 13 Atl. 110, 111 (1888); *Murray v. Sanderson*, 62 Wash. 477, 114 Pac. 424 (1911). For a collection of cases see Annot., 59 A.L.R. 809, 824 (1929).

<sup>280</sup> See *Brown v. Bradley*, 259 S.W. 676 (Tex. Civ. App. 1924).

<sup>281</sup> CAL. CIV. CODE § 3408.

<sup>282</sup> Only by jurisprudence. Although the Code is silent, damages are recoverable against the mistaken party. See JOSSERAND, *COURS DE DROIT CIVIL POSITIF FRANCAIS* art. 72(2) (2d ed.). No damage-interest will be awarded, nor rescission allowed, if the mistaken party was negligent. Judgment of July 25, 1900, [1902] *Recueil Général de Lois et des Arrêts* I. 317 (Cass. civ.).

<sup>283</sup> GERMAN CIVIL CODE § 122.

<sup>284</sup> SWISS CODE OF OBLIGATIONS arts. 26, 107; 64 ATF II. 9, [1939] J. Trib. 158 (1939).

<sup>285</sup> ITALIAN CIVIL CODE art. 1223.

<sup>286</sup> AUSTRIAN CIVIL CODE art. 878.

<sup>287</sup> See MACHADO, *COMENTARIOS* 121-22 (1875).

China,<sup>288</sup> Louisiana<sup>289</sup> and California,<sup>290</sup> where the reliance interest doctrine permits relief to the mistaken party in a much wider range of situations than in the common law

There is no room for doubt that the subjective approach to the problem of relief from unilateral mistake in contracting enlarges the scope of excusable errors which entitle the mistaken party, in civil law, to rescind a contract. There is equally no room for doubt that the area of difference in result from the objective approach to the problem of relief in common law is greatly narrowed by the requirement of awareness of the possibility of mistake. The tests as to the extent of suspicion of mistake, either in the subject matter of the contract or in the motive for contracting which may lead to frustration of purpose, vary from country to country, but the ultimate effect of the requirement on enforceability leads, in many cases, to fairly similar results in the case of unilateral mistake. As in other comparisons between the results of the operation of different conceptual approaches to the solution of legal problems in the two master systems, the primary difference is due to the imperfect reception of the principles of equity in Anglo-American common law

### *Third Party Contracts*

In classic Roman law a contract could not confer a benefit on a stranger to the contract. A basic doctrine of contract law was "nemo alteri stipulari potest." Exceptions began in the time of Justinian. The Roman *stipulatio* was to the effect that an enforceable promise for the benefit of a third person could be created only (1) by exacting a promise to pay a third person if the promisor did not render some performance to the person who had exacted the promise, or (2) by a transfer of property as a gift subject to the donee's charge to transfer the property to another.<sup>291</sup> This narrow limitation of the rights of strangers to the contract was, until comparatively recent times, a basic doctrine of the civil law. The expansion of the doctrine in civil law countries in recent years is an example of how the law, in order to meet new needs of society, bursts the bonds created by codes.<sup>292</sup> The

<sup>288</sup> CHINESE CIVIL CODE art. 91 (Hsia, Chow, Chich & Chang transl. 1944).

<sup>289</sup> LA. CIV. CODE ANN. § 1837 (West 1952) (errors of person). This was extended by analogy, by jurisprudence in *Youngblood v. Daily Tribune*, 15 La. App. 379, 131 So. 604 (1930).

<sup>290</sup> *Goodrich v. Lathrop*, 94 Cal. 56, 29 Pac. 329 (1892). CAL. CIV. CODE § 3408. See McClintock, *Mistake and the Contractual Interests*, 28 MINN. L. REV. 460 (1944).

<sup>291</sup> 1 POTHIER, OEUVRÉS No. 70 (1830).

<sup>292</sup> On the liberal application of the provisions of the French Civil Code see 6 PLANIOL & RIPERT, *op. cit. supra* note 242, No. 353 (1930).



enlargement of the civil law doctrine finds additional support in the Roman law doctrine of *negotiorum gestio*.<sup>293</sup>

Article 1119 of the French Civil Code provides that one can contract only for his own benefit, except where the stipulator has an interest.<sup>294</sup> The situations provided for in Article 1121 and 1165 of the Civil Code are where the promisee derives a personal benefit from the performance to be made to the third person, and where the promisor received property which he agreed to deliver as a gift from the transferor to a third person. Article 1121 provides that

When such is the condition of a stipulation that a person makes for himself, or of a donation that he makes for another, he who has made such a stipulation can no longer revoke it, if the third party has declared himself willing to profit by it.

A stipulation for another, to have any effect, must be a condition attached to a stipulation for oneself or a charge imposed on a donation made to another.<sup>295</sup> Tunc refers to the broad interpretation given to Article 1121 as an example of "giving to the law a progressive and general adaptation to modern conditions of life."<sup>296</sup> Thus by a process of interpretation of the two exceptional situations provided for in Article 1121 and 1165,<sup>297</sup> almost every promise or transfer for the benefit of a third person is directly enforceable by the third person against the promisor, as in the law of the United States, where the contract can be enforced directly by the third party beneficiary. The exceptions have been so extended by jurisprudence as to recognize the validity of virtually every promise for the benefit of a third person.

The Civil Code enunciates the general principle that a person cannot exact a promise for a third party otherwise than as an agent. By way of exception it provides that a person can stipulate for the benefit of a third party when this is the condition of a stipulation for his benefit, or of a donation made for another. By a devious course of interpretation the exception has been made to eat up the rule, so that third party rights are now fully protected in French law.<sup>298</sup>

<sup>293</sup> See Williston, *Contracts for the Benefit of a Third Person in the Civil Law*, 16 HARV. L. REV. 43 (1902).

<sup>294</sup> *Accord*, EGYPTIAN CIVIL CODE art. 154 (Perrott, Fanner & Sims Marshall 1952). See also *id.* art. 155. The stipulation is revocable until the beneficiary notifies the promisor of his assent.

<sup>295</sup> See 1 POTHIER, *OEUVRES* No. 70 (1830).

<sup>296</sup> Tunc, *The Grand Outlines of the Code Napoleon*, 29 TUL. L. REV. 431, 441 (1955).

<sup>297</sup> See generally Razi, *Reflections on Equity in the Civil Law Systems*, 13 AM. U.L. REV. 24 (1963).

<sup>298</sup> Lawson, *The Approach to French Law*, 34 IND. L.J. 531, 540 (1959).

In the common law the rights of third parties have always been recognized in the United States, and since the 1920's, they have also been recognized in England.

### *Frustration of Contractual Expectations*

It has been said that "the need for some exoneration from the obligations of a contract is necessary and now widely recognized in different legal systems."<sup>299</sup> An example of the almost universal appeal of the principles of equity to the human conscience is the uniformity of the gradual enlargement in different legal systems of the defense of impossibility of performance of contracts to the defense of frustration of the purpose for which the contract was made. The defense of impossibility is often allowed even though performance would still be possible and has come to be called economic impossibility. The doctrine of economic impossibility was introduced in Germany during the First World War but was confined to general economic changes which involved the prospect of economic ruin.<sup>300</sup> The German doctrine is based on the general sections of the Civil Code requiring good faith and conformity to ordinary practice.<sup>301</sup> As early as 1850, the doctrine had been suggested by Windscheid in his theory of presuppositions ("Voraussetzung") of the contract.<sup>302</sup> In 1921, Windscheid's theory was revived by Oertmann and re-named the requirement basis ("Geschäftsgrundlage") the assumption, obvious to the other party to the contract, as to circumstances which formed the basis of the contractual intent.<sup>303</sup> This test is somewhat similar to the American doctrine of basic assumptions, although it is not subject to all the imperfections of that doctrine. The weakness of the American doctrine, as Corbin has pointed out,<sup>304</sup> is that the assumption may not be obvious and yet may warrant relief. In German law, section 306 of the Civil Code, which provides that impossibility is no defense unless it existed at the initiation of the contract, has been extended by judicial decision to include supervening impossibility.<sup>305</sup>

<sup>299</sup> Wortley, *The Need for More Uniformity in the Law Regulating the International Sale of Goods in Europe*, in *Legal Problems of the European Economic Community and the European Free Trade Association*, INT. & COMP. L.Q., No. 1, 45, 53 (1961).

<sup>300</sup> 98 RGZ 18, 21, [1921] J.W. 763 (1920).

<sup>301</sup> See Hay, *Frustration and its Solution in German Law*, 10 AM. J. COMP. L. 345, 356-73 (1961).

<sup>302</sup> DIE LEHRE DES ROMISCHEN RECHTS VON DER VORAUSSETZUNG (1950).

<sup>303</sup> See NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 195 (1961).

<sup>304</sup> 6 CORBIN, *CONTRACTS* § 1322 (rev. ed. 1962).

<sup>305</sup> 42 RGZ 115 (1899).

In French law there are two articles of the Civil Code<sup>306</sup> which provide for relief in cases of legal or physical impossibility. There is no provision in the code for the doctrine of *clausula rebus sic stantibus* which is found in Roman law. In France the doctrine of economic frustration is applied to public contracts in the Conseil d'Etat but is rejected in the case of private contracts in the Cour de Cassation.<sup>307</sup> In 1916, the Conseil d'Etat extended the defense of impossibility to situations in which performance had become merely more burdensome although not impossible.<sup>308</sup> The decision rests on an implied intention of the parties to include the *rebus sic stantibus* principle, based on Article 1150 of the Civil Code and on the good faith requirement of Article 1134.

In Swiss law the doctrine of frustration finds its origin in Article 373 of the Code of Obligations, which permits the judge, where extraordinary circumstances have intervened, to increase the price or to allow rescission. Support for the frustration doctrine is found in the broad requirement of good faith in Article 2 of the Civil Code. There is an express provision in Article 527 of the Code of Obligations for rescission for excessive hardship due to intervening circumstances, but the provision is construed to provide only for rescission of agreements for lifelong support. Various theories have been advanced as to the ground for granting relief. Examples of the exercise of the power of rescission under Article 373 are war, natural cataclysm, local troubles, or the burning of a factory.<sup>309</sup>

In India and Pakistan the doctrine of frustration is applied in the face of a statute which refers only to impossibility.<sup>310</sup> In Spain the doctrine of frustration is narrowly applied.<sup>311</sup> The doctrine is recognized in Soviet law only in cases in which the interests of the State are involved. The doctrine is not a part of Islamic law.

In the Italian Civil Code there are two provisions dealing with the effect of supervening events which increase the burden of performance. Article 1463 provides that in synallagmatic contracts a party released by supervening impossibility cannot require performance by the other party. Article 1467 deals specifically with frustra-

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<sup>306</sup> FRENCH CIVIL CODE arts. 1147, 1148.

<sup>307</sup> Judgment of Nov. 15, 1933, 134 Recueil de la Gazette des Tribunaux I. 17 (Cass. civ.).

<sup>308</sup> Judgment of May 30, 1916, [1916] Recueil Périodique et Critique III. 25 (Conseil d'Etat).

<sup>309</sup> 48 ATF II. 366 (1922).

<sup>310</sup> INDIAN CONTRACTS ACT § 56(2).

<sup>311</sup> PING PENA, TRATADO DE DERECHO CIVIL ESPANOL 49, 58 (1946).

tion due to other circumstances than impossibility and provides that in contracts for continuous performance, for performance in installments, or for deferred performance discharge or adjustment may be granted if performance becomes "excessively onerous" by reason of "extraordinary or unforeseeable events," unless the event or situation was "a normal risk of the contract."<sup>312</sup> In Article 1467 the Italian legislators reinstated the Roman doctrine of *rebus sic stantibus*, a particularly striking innovation in Italian law since the Civil Code of 1865 had treated conditions with extreme technicality and made no allowance for mutually interdependent conditions. The Italian Civil Code of 1942 bases the doctrine of frustration on the theory of *rebus sic stantibus*.<sup>313</sup> Excessive hardship due to war, if unforeseen, excuses performance.<sup>314</sup> Destruction of material also excuses performance.<sup>315</sup>

Hungarian law applies the doctrine of frustration, without authority in the unenacted code of 1928, in cases of depreciation.<sup>316</sup> Rescission for economic impossibility is allowed only if the other party would have received a disproportionately large profit. In Brazil, the Court of Appeal of Rio de Janeiro, in 1933, rescinded a contract on the theory of *imprévision*.<sup>317</sup> After the Second World War, rescission was allowed to prevent the ruinous effect of inflation, as was also the case in Chile and in The Argentine.<sup>318</sup> The 1941 project for the revision of the Brazilian Civil Code, not yet completed, includes in Article 322 a provision for relief in cases of frustration. Extreme difficulty and excessive injury would permit modification of the contract.

The earliest example of the doctrine of frustration in England is the case of *British Movietonews, Ltd. v. London and District Cinemas, Ltd.*<sup>319</sup> The House of Lords reversed the decision, but in 1956 the doctrine was again applied in *Davis Contractors Ltd. v. Fareham U.D.C.*, in a decision by Lord Radcliffe.<sup>320</sup> The standard of fundamental changes in circumstances is very strictly defined.

In cases at common law in the United States the doctrine is also

<sup>312</sup> COLAGRESSO, *IL LIBRO DELLA OBBLIGAZIONE—COMMENTO AL NUOVO CODICE CIVILE ITALIANO* 492 (1943).

<sup>313</sup> I BETTI, *TEORIA GENERALE DELLA OBBLIGAZIONI* 188 (1953).

<sup>314</sup> NEWMAN, *op. cit. supra* note 303, at 234.

<sup>315</sup> *Id.* at 230.

<sup>316</sup> HUNGARIAN CIVIL CODE OF 1928 (unenacted) art. 1150; Case No. 2990 M.D. (1927).

<sup>317</sup> See NEWMAN, *op. cit. supra* note 303, at 201 n.50.

<sup>318</sup> See CARDINI, *IMPREVISION* (1937).

<sup>319</sup> [1950] 2 All E.R. 390 (Denning, L.J.), *rev'd*, [1951] 2 All E.R. 617. See generally Gow, *Some Observations on Frustration*, 3 INT. & COMP. L.Q. 291, 320 (1954).

<sup>320</sup> [1956] 2 All E.R. 145, 156 (Radcliffe, L.J.). See *Société Franco Tunisienne D'Armement v. Sidermar S.P.A.*, [1960] 2 All E.R. 529.

applied, but only sparingly.<sup>321</sup> It is generally denied in actions for damages, but in equity the doctrine is applied,<sup>322</sup> although to a much less extent than on the European continent. Under the Uniform Commercial Code a party who is excused may nevertheless be required to make substituted performance.<sup>323</sup> Under the English Frustrated Contracts Act an apportionment of benefits is permitted.<sup>324</sup> The obligor may be required to restore all or part of any sums advanced by the obligee, resembling the doctrine of equitable readjustment in civil law.

It is plain that the German doctrine of "Wegfall der Geschäftsgrundlage," the French doctrine of "imprévision," and the Anglo-American doctrine of failure of basic presuppositions are so similar as to suggest strong mutual influence.<sup>325</sup> A California case uses the term unforeseen supervening circumstances not within the contemplation of the parties.<sup>326</sup> The underlying rationale in all legal systems is relief from hardship, requiring a sharing of the burden between the parties to the contract. The same results are reached in the doctrine of supervening hardship of Swedish law<sup>327</sup> and the doctrine of excessive onerosity of Italian<sup>328</sup> and Polish<sup>329</sup> law. The German doctrine rests on the general provisions of the Civil Code requiring good faith and conformity to ordinary practice.<sup>330</sup> The doctrine of *clausula rebus sic stantibus* is the expression of the same equitable principle in international law.<sup>331</sup>

In rights and obligations arising out of voluntarily assumed relations, the areas of convergence are in the standards to be applied in contractual negotiations and in the situations which require release of one of the parties from the obligations of the contract if the burdens of loss when things go wrong are to be shared. It is clear that the convergences lie mainly in the areas in which equitable considerations form an important element of the governing legal norms.

<sup>321</sup> See, e.g., *Lloyd v. Murphy*, 25 Cal. 2d 48, 153 P.2d 47 (1944), 43 Mich. L. Rev. 985. See generally Anderson, *Frustration of Contract—A Rejected Doctrine*, 3 DEPAUL L. REV. 1 (1953); Comment, 59 MICH. L. REV. 98 (1961).

<sup>322</sup> See *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557 (1869); 5 WILLISTON, CONTRACTS § 1425 (rev. ed. 1937).

<sup>323</sup> UNIFORM COMMERCIAL CODE § 2-614, comment 1.

<sup>324</sup> The Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40.

<sup>325</sup> Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1414 & n.3 (1963).

<sup>326</sup> *Lloyd v. Murphy*, 25 Cal. 2d 48, 53, 153 P.2d 47, 49-50 (1944) (dictum).

<sup>327</sup> SWEDISH SALES ACT § 24 (1905).

<sup>328</sup> ITALIAN CIVIL CODE art. 1467.

<sup>329</sup> POLISH CODE OF OBLIGATIONS art. 269.

<sup>330</sup> GERMAN CIVIL CODE §§ 157, 242.

<sup>331</sup> FRIEDMANN, *LEGAL THEORY* 505 (4th ed. 1960).

## Rights and Obligations Arising out of Non-contractual Relations

### *Rights and Obligations Created by Law to Prevent Unjust Enrichment*

In Roman law the doctrine of unjust enrichment was expressed in the principle of *negotiorum gestio*, according to which the *gestor* might claim reimbursement for his services in managing the affairs of a person who was absent or incapacitated, without his knowledge, even though the services did not ultimately prove beneficial. The doctrine of unjust enrichment also found expression in the *actio de in rem verso*, by which recovery could be obtained against a parent or employer for unauthorized acts of a son or agent.<sup>332</sup> These doctrines implemented the principle that no one should be enriched through another's loss. Of less importance was the *conditio indebiti*, under which payment by mistake entitled the payer to a refund.

### *Benefits Received by Mistake or Without Request*

In civil law the doctrine of unjust enrichment is based directly on the equitable duty to reimburse protective action taken in good faith, the relief stemming from the doctrine of *negotiorum gestio* and the *actio de in rem verso*. There is no general expression of the latter doctrine in the French Civil Code, which recognizes the principle of unjust enrichment in only four specific situations: payment by mistake,<sup>333</sup> payments not due,<sup>334</sup> property received without consideration,<sup>335</sup> and the obligation to restore specific property in kind.<sup>336</sup> Nevertheless, in 1892, the Cour de Cassation laid down the broad rule that no one may enrich himself unduly at another's expense,<sup>337</sup> the basis of the *actio de in rem verso* of Roman law.<sup>338</sup> The Italian Civil Code provides that "A person who, without justifiable cause, has enriched himself at the expense of another must, within the limits of his enrichment, indemnify the latter in an amount corresponding to the loss of property suffered by such person."<sup>339</sup> In German law recovery is limited to situations in which the enrichment was direct.<sup>340</sup>

<sup>332</sup> ULPIAN, DIGEST 3.5.10, 12.6.14, 12.3.8.

<sup>333</sup> FRENCH CIVIL CODE art. 1377.

<sup>334</sup> FRENCH CIVIL CODE art. 1235.

<sup>335</sup> FRENCH CIVIL CODE art. 1376.

<sup>336</sup> FRENCH CIVIL CODE art. 1379.

<sup>337</sup> Judgment of June 15, 1892, [1892] Recueil Périodique et Critique I. 596, 93 Recueil Général de Lois et des Arrêts I. 281 (Cass. req.).

<sup>338</sup> DIGEST 2.6.14. The doctrine is based on pure equity. LAROMBIERE, OBLIGATIONS SOUS L'ARTICLE 1375.

<sup>339</sup> ITALIAN CIVIL CODE art. 2041.

<sup>340</sup> See DAWSON, UNJUST ENRICHMENT 120 (1951); GERMAN CIVIL CODE § 812.

In Soviet law damages for unjust enrichment due to mistaken performance of an invalid contract are forfeited to the State.<sup>341</sup> In the United States there can be no recovery by a volunteer,<sup>342</sup> a mistaken improver,<sup>343</sup> or generally one who pays in error of law.<sup>344</sup> There is no recovery in quasi contract for the use and occupation of land without the consent of the owner, nor, in general, for income derived from a letting of another person's land, for historical reasons; *indebitatus assumpsit* is confined to genuine tenancies.<sup>345</sup> Knowingly receiving benefits from another's services creates a duty to reimburse the person who rendered the services.<sup>346</sup> It is obvious that the comparatively few areas of imperfect acceptance in common law of the doctrine of unjust enrichment and the limited circumstances in which the doctrine is rejected in German law are not sufficiently important to prevent, in the near future, a complete acceptance of the equitable doctrine of unjust enrichment.

### *Encroachers*

No recovery is allowed at common law if the occupier sues for the value of his improvements.<sup>347</sup> In equity, if specific relief is sought against the encroacher, relief will be denied unless the landowner compensates the occupier for the value of his improvements if the improvements were made in good faith.<sup>348</sup> In French law the occupier in good faith may remove his work unless the landowner pays him for its value.<sup>349</sup> In Switzerland the occupier in good faith may even acquire the land for adequate compensation unless the landowner made timely objection to the encroachment.<sup>350</sup> In Italian law the building becomes the property of the occupier for the value, or the cost, or damages. In all these legal systems the principle of the obligation to relinquish the benefits of unjustified enrichment underlies the variations of the application of the principles of law which recognize, in different ways, rights which inhere in the mistaken occupancy of another person's land.

<sup>341</sup> SOVIET CIVIL CODE art. 147.

<sup>342</sup> RESTATEMENT, PROPERTY § 2, comment (1936).

<sup>343</sup> *Isle Royale Mining Co. v. Hertin*, 37 Mich. 332 (1887); *Brand v. Chris Building Co. P'ty, Ltd.*, [1957] Vict. 625.

<sup>344</sup> Corbin, *Quasi-Contractual Obligations*, 21 YALE L.J. 533, 543 (1912).

<sup>345</sup> Ames, *The History of Assumpsit* (pts. 1-2), 2 HARV. L. REV. 1, 53 (1888).

<sup>346</sup> *Ball v. Dolan*, 21 S.D. 619, 114 N.W. 998 (1908).

<sup>347</sup> Cases cited note 343 *supra*.

<sup>348</sup> *Hunter v. Cartoll*, 64 N.H. 572, 15 Atl. 17 (1888).

<sup>349</sup> COLIN & CAPITANT, *COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANCAIS* No. 1066 (10th éd. 1942).

<sup>350</sup> SWISS CIVIL CODE art. 674.

*Imperfect Performance*

In Anglo-American equity, failure to perform a contract exactly as agreed will not preclude enforcement by the party in default, when there is appropriate compensation to the other party.<sup>351</sup> Delay in performance entitles the promisee only to damages for the delay but does not entitle him to refuse the delayed performance. This is also the law in Germany,<sup>352</sup> France,<sup>353</sup> Switzerland,<sup>354</sup> Italy<sup>355</sup> and Austria.<sup>356</sup> In German law a promisor in default by reason of delay in performance must be given a reasonable time, after notice, in which to perform.<sup>357</sup> Until then, no damages can be recovered by the party who is entitled to receive the performance. In France the requirement of reasonable notice, the *mise en demeure*, or placing in default, is optional with the injured party and is not a condition to his right to redress.<sup>358</sup> In China the equitable doctrine of relief against forfeiture was law by the time of the Sung Dynasty (960-1279 A.D.), a thousand years ago.<sup>359</sup> Only in the inner system of Anglo-American common law is the right of a person who is in default to obtain compensation from the adversary party denied;<sup>360</sup> but the equitable doctrine is making constant inroads in actions for damages, as the doctrine of substantial performance gains increasing acceptance in the English speaking parts of the world.<sup>361</sup> Except for comparatively rare exceptions in Anglo-American common law, the general acceptance of the substantial performance doctrine is due to the phenomenon, rarely encountered in Anglo-American common law, that the equitable standards of honesty have been completely accepted in the Anglo-American law of unjust enrichment.

<sup>351</sup> See 3 CORBIN, CONTRACTS § 704 (1950).

<sup>352</sup> Judgement of Dec. 18, 1925, 55 J.W. 985 (Reichsgericht).

<sup>353</sup> 2 RUPERT & BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL No. 1259 (2d ed. 1947).

<sup>354</sup> SWISS CODE OF OBLIGATIONS art. 107.

<sup>355</sup> ITALIAN CIVIL CODE art. 1432 provides that a party who has acted under mistake cannot demand the annulment of the contract if prior to the time when such party might have been prejudiced by the mistake, the other party offers to perform in a manner conforming to the intent of the mistaken party. See also *Vanzo v. Barbara*, xxiv Giurisprudenza Completa della Corte Suprema di Cassazione II. 756 (1950).

<sup>356</sup> AUSTRIAN CIVIL CODE § 919.

<sup>357</sup> GERMAN CIVIL CODE § 286.

<sup>358</sup> FRENCH CIVIL CODE arts. 1153, 1176.

<sup>359</sup> *Miscellaneous Rules, LAWS AND RULES ON PENAL MATTERS OF THE SUNG DYNASTY* vol. 26.

<sup>360</sup> *Saperstein v. Mechanics & Farmers Sav. Bank*, 228 N.Y. 257, 126 N.E. 708 (1920).

<sup>361</sup> RESTATEMENT, CONTRACTS § 375; WILLISTON, CONTRACTS § 494 (rev. ed. 1936). Note, 31 COLUM. L. REV. 307 (1931). See Annot., 65 A.L.R. 1297 (1930).



### *Liability for Negligence*

In primitive societies the wielder of an instrument was identified with injuries inflicted by it. The direct causality determined responsibility, that is, the obligation to answer for the injury.<sup>362</sup> Very early, however, the doctrine evolved that responsibility existed, apart from consensual arrangements, only for fault. In Roman law, torts, unlike nominate contracts, were not classified. This may explain the generality of the provisions of the French Civil Code, which makes a person liable for harm which he has caused, enabling the entire law of delictual responsibility to be stated in five terse articles. The problem of legal responsibility is approached generally rather than, as in common law, from the starting point of closely defined individual torts. The Roman law doctrine of liability only for fault has since very early times been a part of western law

In French law the general basis of tort liability is negligence or the intentional infliction of harm,<sup>363</sup> although this concept is not expressly stated in the Civil Code. The part of the Code which deals with delictual responsibility starts with the provision in Article 1382 that everyone is obliged to repair injury which he has caused. The next article, 1383, provides that one is liable not only for injuries caused by his conduct but also for those caused by his negligence. It is obvious that Article 1382 requires fault to establish liability, otherwise the reference in Article 1383 to negligence would be superfluous. This article defines fault in terms of negligence. The following article, 1384, provides that a guardian or person having control of an inanimate object is responsible for damage by fire caused by the object, and Article 1385 provides for liability for damage caused by an animal owned by the defendant. These two articles are clearly exceptions to the general rule of liability only for fault. The final article dealing with tortious liability, Article 1386, which provides for liability for damage caused by the destruction of a building not kept in good condition, rests also on strict liability<sup>364</sup> There must be causation between

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<sup>362</sup> CODE OF HAMMURABI law 233 (cir. 1960 B.C.).

<sup>363</sup> 2 PUFFENDORF, *ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS* 263 (Oldfather transl. 1964) refers to the principle "let man make good the damage he has done to a second person by his fault."

<sup>364</sup> 2 PLANIOL, *TRAITÉ PRATIQUE DU DROIT CIVIL FRANCAIS* pt. 1, Nos. 924, 928 (11th ed. 1939); see JOSSERAND, *DE LA RESPONSABILITÉ DU FAIT DES CHOSSES INANIMÉES* (1897); PLANIOL, *RÉSPONSABILITÉ DU FAIT DES CHOSSES*, *RÉVUE CRITIQUE* 80 (1906). In jurisprudence, a presumption of fault exists against the owner of the thing. Judgment of June 16, 1896, [1897] *Recueil Périodique et Critique* I. 433, [1897] *Recueil Général de Lois et des Arrêts* I. 17 (Cass. civ. 2e), prior to the law of 9 April 1898, which

the fault, required under Article 1382, and the injury, to make the actor responsible.

### *Strict Liability*

In modern times the recognition of liability without fault, or strict liability, has been widely received in both civil and common law. The doctrine of strict liability, apart from the specific situations mentioned in the Code, was introduced into French law in 1896 on the basis of a presumption of negligence. Much the same development had already taken place in Anglo-American law, commencing in 1863, on the basis of the doctrine of *res ipsa loquitur* and in the exceptional case of the obligation to provide support of adjoining land, i.e. the doctrine of *Rylands v. Fletcher*.<sup>365</sup> In both legal systems, strict liability is considered an exception to the general rule of liability based on fault. In French law the extension has been just as real as in Anglo-American law, although less explicitly stated. The Court of Cassation still prefers to rest the doctrine, however, on the specific exceptions in the Civil Code.<sup>366</sup>

In German law the doctrine of strict liability was provided for in the Civil Code of 1900. Section 823 provides that "one, who designedly or negligently injures life, body, health, freedom, the property or any right of another is bound to indemnify the other for the injury arising therefrom." This section expressly rests liability on intent to injure, or on negligence. Section 833 provides that "if a human being is killed, or injured or a thing is damaged by an animal, its keeper is bound to indemnify the party injured for the damage resulting therefrom." This provision, resting on strict liability, is obviously an exception to the general rule. Section 836 provides that

if, by the fall of a building a human being is killed or injured, or a thing damaged, the possessor of the lot of land, in so far as the fall or the severing is the consequence of faulty arrangement or insufficient maintenance, is bound to indemnify the person injured for the damage. The obligation does not occur if the owner for the purpose of averting the danger has observed the care required in trade.

This bases the liability on negligence, contrary to the corresponding provision of the French Civil Code. The modern doctrine of strict

eliminated the importance of the distinction in the case of industrial accidents. See also Gaudemet, 1927 *REVUE TRIMESTRIELLE* 893.

<sup>365</sup> [1868] L.R. 3 H.L. 330.

<sup>366</sup> L'Affaire *Giry*, [1955] *Juris-Classeur Périodique* No. 8691 (Paris 1re Ch. Feb. 2, 1955) *et* [1956] *Juris-Classeur Périodique* No. 9681 (Cass. 2d Ch. civ. Nov. 23, 1956) (Note by Esmem).

liability is recognized in German law under the name of *Gefährdungshaftung*, hazardous activities. The principal kinds of accidents within the meaning of section 823 are railway, industrial and motor vehicle accidents.

Both civil law and common law, after a very early period of strict law, developed the doctrine of liability only for fault. Under the pressure of new social needs arising from industrial advance, this doctrine has been modified so as to embrace a wide variety of situations in which strict liability becomes actionable. Examples are the workmen's compensation legislation, the obligation of landowners to support the land adjoining their property, and the liability of operators of aircraft for damage to the property over which the aircraft flies.<sup>367</sup> Strict liability in modern law is far different from the test of causation in primitive times. It rests, in many situations, on the attribution of responsibility to the person or firm in the chain of causation by which the burden of risk can be shifted most effectively to the segment of the community which is actually or potentially concerned with protection from similar injuries in the future. The enlargement has been somewhat greater in common law than in civil law, but the same trend is clearly discernible in both systems. In recent times the common law doctrine has been expanded in some jurisdictions to include responsibility of a manufacturer for harm caused by the use of his product even after it has been re-sold to another.<sup>368</sup> In a recent decision of a California court, the doctrine was extended to a wholesaler, who was neither a manufacturer nor a retailer, for failure to give notice to the purchaser of a fuse for detonating powder that the fuse burned more quickly than other fuses already in use.<sup>369</sup> Both systems have abandoned the early approach which imposed liability almost exclusively for fault.

Scandinavian and Swiss law have recognized situations in which a person may be liable without any fault of his own. Toward the end of the nineteenth century, Scandinavian law by judicial decision,<sup>370</sup> usually in the case of ultra-hazardous activities, as in German, French and American law, imposed strict liability for the risks of modern life. The concept of strict liability in the modern sense has been accepted in the law of western societies without regard to conventional concepts of tort liability

<sup>367</sup> *United States v. Causby*, 328 U.S. 256 (1946).

<sup>368</sup> See Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 358 (1924).

<sup>369</sup> *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

<sup>370</sup> Ussing, *Scandinavian Law of Torts*, 1 AM. J. COMP. L. 359, 361 (1952).

## Enforcement of Rights and Obligations

### *Specific Enforcement*

It is commonly thought that the doctrine of specific enforcement of obligations, for example by decrees directing the specific performance of contracts, is peculiar to the common law. This view is incorrect except in the particular application of specific enforcement to personal mandates of the court enforced by imprisonment for contempt. In Roman law the tendency was to confine enforcement to pecuniary compensation. This limitation stemmed from the concept of absolute ownership; no qualification of this concept could be suffered as the result of contract. The *res* itself could not be subjected by the creditor of the owner to alteration of the right to its absolute ownership for the satisfaction of obligations due to the creditor. Either the alienation of ownership must take place concurrently with the execution of the contract of sale or the contract left the ownership intact. In modern times an additional basis of the limitation of enforcement to pecuniary compensation is to be found in the ideological bases of the French Revolution.<sup>371</sup> The feeling that men should not be denied their personal liberty by imprisonment for civil wrongdoing has led to the virtually uniform rejection, throughout the civil law countries, of imprisonment for contempt, and as a result, the most effective means for commanding the performance of duties requiring personal action by the obligor has been abandoned. Pothier said that only damages were available in obligations to do or not to do, and this precept was carried into the French Civil Code in Article 1142, which declares that the breach of obligations to do or not to do results only in damages. However, the next article, 1143, provides that the creditor can demand that that which was done in violation of the agreement be destroyed and can have himself authorized to destroy it at the debtor's expense. Article 1144 provides that the creditor can also, in case of nonperformance, be authorized to perform at the expense of the debtor. Taken together, the courts have construed the three articles to mean that the provisions for specific execution are the general rule, and only where specific execution is impossible or impracticable will the creditor be left to his remedy in damages. Building on the provisions of Articles 1143 and 1144, the courts have reconciled the conflict between 1142 and the two following articles by a somewhat forced construction of Article 1142. That article has been construed to express the ordinary result in such obligations, according to which the creditor is reimbursed

<sup>371</sup> POTHIER, *Traité de contrat de vente*, OEUVRÉS No. 68 (1824).

for his outlay in damages, in connection with decrees for specific execution, and the debtor is not required personally to perform.<sup>372</sup> There are numerous decisions which illustrate the primacy in French law of specific relief for breach of all sorts of voluntary obligations. In case of obligations to give, forced execution is the ordinary method of enforcement, but in the case of obligations to do or not to do, forced execution is somewhat exceptional. In German law the plaintiff is precluded from obtaining a judgment for damages unless he has first given the defendant an opportunity to perform the contract.

The English chancellor found a model for enforcement of obligations in the canon law. The canonical doctrine that the remedy of *denunciatio evangelica* was not necessary if an ordinary action at law was available accurately mirrors the doctrine of equity that equity will act only in the absence of an adequate remedy in damages. In the canonical institution of *imploratio officii iudices*, providing for relief in cases of extreme hardship,<sup>373</sup> is to be found the prototype of the doctrine of equity that equity will act only to prevent irreparable injury. As in canon law the decisive question was whether the defendant could have acted as he did in good conscience, and relief in the court of the chancellor was granted according to criteria which were not confined by rules of strict logic or by analogy to prior decisions. In canon law good conscience required personal activity and accurate fulfillment of promises by actual performance.<sup>374</sup> The doctrine of *denunciatio evangelica* of twelfth century canon law provided for worldly redress as well as penitence; a perfect model for the doctrine of equity that equity acts *in personam*. In equity the emphasis is on the defendant's duty.<sup>375</sup>

The two streams of juristic thought represented in the civil law and common law doctrines have produced differences in methods of

<sup>372</sup> Articles 1143 and 1144 of the French Civil Code authorize the creditor (plaintiff) to perform the debtor's obligation at the debtor's expense. Direct execution is available to obtain the possession of land. 7 PLANIOL & RIPERT, TRAITÉ PRATIQUE DU DROIT CIVIL FRANÇAIS No. 779 (2d ed. 1954). In German law the buyer can have specific enforcement if the asset can be reached by physical seizure. ZIVILPROZESSORDNUNG [ZPO] §§ 833, 886. Title to land can pass by force of the judgment ZPO §§ 894, 896.

<sup>373</sup> The canonical institution of *imploratio officii iudices* was in common use when the English Chancery began to function as a court, in the middle of the fourteenth century.

<sup>374</sup> Fry, *Specific Performance and Laesio Fidei*, 5 L.Q. REV. 235 (1889); Case No. 1893, BRACTON'S NOTEBOOK (1227) (Maitland ed.); Decretal, Greg. IX 1.35.3 ("studioso agendum est ut ea quae promittuntur opere compleantur"); 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 189 (3d ed. 1923); Coing, *English Equity and the Denunciatio Evangelica of the Canon Law*, 71 L.Q. REV. 223 (1955).

<sup>375</sup> Ames, *Law and Morals*, 22 HARV. L. REV. 97, 106 (1908).

enforcement in the two master systems. However, the difference proves, on closer examination, to be less unbridgeable than is commonly supposed. In French and German law obligations are enforced specifically in many more cases than in common law, by methods other than imprisonment for contempt. A common method of specific enforcement is through a judicial mandate empowering the plaintiff, or an officer of the court, to perform the necessary operations at the expense of the defendant. This method is used in all cases in which the obligation can be carried out without the personal action of the obligor, and where merely ministerial acts are required, as in the case of the execution and delivery of a deed by the effect of the decree itself. In French law, obligations to give are enforced by specific execution, since such obligations are of a nature which permits such enforcement without the personal action of the promisor.<sup>376</sup> A specific description of the property is of course necessary. As between the parties, an agreement to sell personal property is, in some civil law systems, equivalent to an actual transfer of title.<sup>377</sup> This doctrine finds a counterpart, so far as the transfer of equitable ownership is concerned, in the common law doctrine of equitable conversion in contracts for the sale of land.

In 1889, the doctrine of *astreinte* was introduced into French jurisprudence.<sup>378</sup> The doctrine is a direct inheritance from Roman law.<sup>379</sup> As an inducement to specific performance by the defendant, the court will fix a penalty, increasing daily as long as the delay lasts. As a rule, the damages fixed are greatly in excess of the pecuniary prejudice to the plaintiff caused by the debtor's default. Although there is nothing in French procedure resembling the Anglo-American injunction, the sanction of moratory damages is used to enforce obligations not to do as well as obligations to do. The doctrine of *astreinte* finds no authority in the French Civil Code. It is the impression of many French jurists that the *astreinte*, although purely an *in terrorem* judicial stratagem with no sanction other than its intimidating effect, is extremely successful in inducing personal performance by the defendant.<sup>380</sup> Thus in French law obligations to give are enforced by natural

<sup>376</sup> FRENCH CIVIL CODE art. 1144; Houzier v. Sommer, [1889] Recueil Pénodique et Critique I. 445 (Cass. req. March 14, 1889).

<sup>377</sup> FRENCH CIVIL CODE art. 1138. See Ames, *Specific Performance in French Law*, 17 L.Q. REV. 372 (1901).

<sup>378</sup> Judgment of March 20, 1889, [1889] Recueil Pénodique et Critique I. 382, [1892] Recueil Général de lois et Arrêts I. 565 (Cass. civ.).

<sup>379</sup> ULPAN, DIGEST 12.3.1.

<sup>380</sup> "L'Astreinte comminatoire n'est tout de même pas dépourvue d'utilité, car la crainte subsiste de voir le tribunal évaluer très largement le préjudice pour rapprocher

execution without the intervention of the debtor, and obligations to do or not to do may be enforced by the plaintiff at the expense of the debtor. These remedies failing, the threat of the effect of moratory damages is successful in many cases in inducing personal performance by the defendant, even though the threat can never be given legal effect unless the damages are reduced to a proper compensatory amount. Also, penal clauses are enforced in French law; another sanction which is not available in common law

The French doctrine of *reparation en natur*, giving the plaintiff the right to perform the obligation at the debtor's expense, has its counterpart in the German doctrine of *naturalthersetzung*, unless the cost is disproportionate,<sup>381</sup> and in Swiss law.<sup>382</sup> In German law, imprisonment for contempt is allowed in special circumstances,<sup>383</sup> but elsewhere on the continent it is not employed.<sup>384</sup> In Scots law specific restitution, called specific implement, is the ordinary remedy.<sup>385</sup> When one calls to mind the many situations in which the common law denies specific enforcement—indefinite contracts,<sup>386</sup> contracts requiring construction work,<sup>387</sup> situations in which the balance of convenience inclines in favor of the defendant,<sup>388</sup> continuous performance,<sup>389</sup> personal services,<sup>390</sup> situations in which the public interest requires that the obligation of the defendant be not carried out specifically,<sup>391</sup> and especially the very large number of cases in which the presence of an adequate

le plus possible le chiffre des dommages-interets du montant de l'astreinte prononcée." (The threat of the astreinte is nevertheless not without utility, for the fear remains of seeing the court evaluate generously the damage in order to bring the calculation of the damages as closely as possible to the sum of the astreinte.) MAZEAUD, MAZEAUD & MAZEAUD, *LECONS DE DROIT CIVIL* No. 338 (3d ed. 1963).

<sup>381</sup> GERMAN CODE OF CIVIL PROCEDURE §§ 887(1), 257(2).

<sup>382</sup> SWISS CODE OF OBLIGATIONS art. 98.

<sup>383</sup> 8 RGZ 336 (1882); ZPO § 899; see Jann, *Contempt of Court in Western Germany*, 8 AM. U.L. REV. 34 (1959).

<sup>384</sup> NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* 71-72 (1961).

<sup>385</sup> *Stewart v. Kennedy*, [1890] 15 A.C. 75 (Scot.); T. B. SMITH, *Scotland*, 1 THE BRITISH COMMONWEALTH, THE DEVELOPMENT OF ITS LAWS AND CONSTITUTIONS Pt. 2, 1050 (Keeton ed. 1955).

<sup>386</sup> See *Shayeb v. Holland*, 321 Mass. 429, 73 N.E.2d 731 (1947); *Simpson, Equity*, 1947 ANN. SURVEY AM. L. 803, 812.

<sup>387</sup> See *Beck v. Allison*, 56 N.Y. 366 (1874).

<sup>388</sup> *Curtan v. Holyoke Water Power Co.*, 116 Mass. 90 (1874); RESTATEMENT, CONTRACTS § 367 (1932); Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905); McClintok, *Discretion to Deny Injunctions against Trespass and Nuisance*, 12 MINN. L. REV. 565, 568 (1928).

<sup>389</sup> *Marble Co. v. Ripley*, 77 U.S. (10 Wall.) 339, 358 (1870); POMEROY, *SPECIFIC PERFORMANCE OF CONTRACTS* § 23 (3d ed. 1926).

<sup>390</sup> *De Rivafrinoli v. Corsetti*, 4 Paige 264 (N.Y. 1833).

<sup>391</sup> *Rockhill Tennis Club v. Volker*, 331 Mo. 947, 56 S.W.2d 9 (1932).

remedy in the form of damages is held to bar specific enforcement<sup>392</sup>—the methods of enforcement in the two master systems approach each other much more closely than appears from a comparison of the conceptual formulations of the remedies available in the civil and common law systems.

### *Equitable Revision*

There exists in civil law a doctrine of reformation of contracts by the court which is entirely different from the meaning of the term in Anglo-American law. The doctrine was first introduced in Switzerland<sup>393</sup> and permits a court not merely to grant rescission of a contract which has become unduly oppressive by reason of newly arisen and unforeseeable circumstances but to revise the terms of a contract to conform with what is fair under the circumstances which have arisen. The German courts, relying on section 242 of the German Civil Code, which requires performance in good faith, shape the contract in accordance with changes in circumstances. The economic upheaval must be fundamental.<sup>394</sup> If appropriate, the court will increase the payments rather than permit rescission.<sup>395</sup> Where a lease of business property required the landlord to furnish steam for industrial purposes and the price of steam greatly increased due to the war, the court allowed additional rent in a suit by the landlord for that relief.<sup>396</sup> In Italian law, Article 1450 of the Italian Civil Code expressly empowers the judge to grant or deny rescission depending on whether the debtor will offer, and the creditor will accept, an equitable readjustment of the consideration. This is the approach in German law, where the court will rescind the contract unless there is an agreement by the defendant to adjust the terms.<sup>397</sup> The Swiss courts go further in authorizing a positive revision by the court rather than the indirect pressure of offering the defendant the privilege of escaping the effect of rescission by agreeing to an equitable readjustment.<sup>398</sup> Relief will be given in Switzerland if the circumstances would produce economic ruin

<sup>392</sup> Kent, C., in *Jerome v. Ross*, 7 Johns. Ch. 315, 331 (1823); see *Union Pac. Ry. v. Chicago R.I. & Pac. Ry.*, 163 U.S. 564 (1896). See UNIFORM COMMERCIAL CODE § 2-716; UNIFORM SALES ACT § 68.

<sup>393</sup> SWISS CODE OF OBLIGATIONS art. 373.

<sup>394</sup> 107 RGZ 124 (1924) (inflation).

<sup>395</sup> 107 RGZ 78 (1924).

<sup>396</sup> 100 RGZ 129 (1920).

<sup>397</sup> See The Decree on Judicial Assistance in Respect of Contracts, Nov. 30, 1939, [1939] 1 REICHSGESETZBLATT I. 2329.

<sup>398</sup> 59 ATF II. 372 (1933).



unless the contract is revised or rescinded.<sup>399</sup> Article 269 of the Polish Code of Obligations of 1933 provides that where, by reason of war or natural catastrophe, performance becomes impossible and the benefit of the contract is lost, the court may revise, extend or discharge the contract. Article 42 provides that a party who has been exploited can sue to scale down his own performance or to augment the other party's performance, with the privilege of rescission if these solutions are difficult to accomplish. Articles 32 and 123 of the Soviet Civil Code provide that in cases of difficulty of performance the court may postpone performance or order performance in installments. There are provisions in Spanish,<sup>400</sup> Greek<sup>401</sup> and Chinese<sup>402</sup> law for modification of contracts as a result of changes in circumstances. It is apparent that the doctrine of equitable revision is closely related to the doctrine of relief from frustration, providing remedies short of complete rescission. In Swedish law the court may set aside or modify contracts when they are in conflict with acceptable business practice or would otherwise be improper.<sup>403</sup>

In Anglo-American equity the consent of the party who seeks to enforce the contract, to an equitable readjustment of its terms, has been made a condition to the denial of rescission.<sup>404</sup> The Uniform Commercial Code provides for revision of unconscionable contracts of sale.<sup>405</sup> In the enforcement of obligations both civil law and common law apply the equitable principle which requires humane enforcement of obligations.

### Conclusion

The basic institutions of law exhibit closer similarity than is commonly thought to exist. Often the similarity of doctrine is buried under the mountain of rules in which the fundamental doctrines have been applied to the circumstances of particular cases. The history of legal institutions reveals a continuing convergence, in different legal sys-

<sup>399</sup> *Ibid.*

<sup>400</sup> For a discussion of SPANISH CIVIL CODE art. 1091 see PING PENA, *TRATADO DE DERECHO CIVIL ESPAGNOL* 49, 58 (1946). See also 2 PUIG BRUTAU, *FUNDAMENTOS DE DERECHO CIVIL* 383 n.21 (1954).

<sup>401</sup> GREEK CIVIL CODE art. 388; see Zepos, *Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946*, 11 *MODERN L. REV.* 36 (1948).

<sup>402</sup> Judicial Yuan Advisory Opinion No. Chia 3439 (1947).

<sup>403</sup> SWEDISH PURCHASE LAW OF 1905, art. 42.

<sup>404</sup> *Willard v. Tayloe*, 75 U.S. (8 Wall.) 557 (1869); *Watters v. Ryan*, 31 S.D. 536, 141 N.W. 359 (1913); *Fontaine v. Brown County Motors Co.*, 251 Wis. 433, 29 N.W.2d 744 (1947).

<sup>405</sup> UNIFORM COMMERCIAL CODE § 2-302.

tems, of doctrines which were initially different from each other. This should occasion no surprise, owing to the origin of all law in human experience and human emotions.<sup>406</sup> A Scottish jurist, who is in an advantageous position to observe the operation of both the great legal systems of the western world, believes that American law has by comparative methods improved on the English common law in many ways and has moved closer to civilian solutions.<sup>407</sup> The main differences in fundamental doctrines prove to be due to imperfect reception, in all legal systems, in varying degrees, of the principles of equity which establish standards of good faith, honesty and compassion. The imperfect reception in law of the moral standards which are commonplace in other institutions of social control—ethics, morals and religion—is due to the unending clash between the legal objective of certainty and the equitable objective of individual justice; a conflict which has troubled legal philosophers since the age of Aristotle. The deepest part of the cleft between the civil law and the common law is in the inner system of Anglo-American common law, in which, by reasons of circumstances of early English history, the reception of equity slowed in the fourteenth century almost to a halt,<sup>408</sup> and has not yet regained its full vigor throughout that legal system.

Complete uniformity between legal systems is neither possible nor desirable. The growth of the law, like the growth of other social institutions, is stimulated by the competition of views emanating from experience in its use. Ends are more important than methods for their attainment. What we are looking for is much more important than the particular techniques for obtaining our ends. Variations in the application of fundamental principles are not such as to preclude communication among nations in the field of law.<sup>409</sup> Equity may be de-

<sup>406</sup> "Law is born naturally in the human spirit." DEL VECCHIO, *HUMANITÉ ET UNITÉ DE DROIT—ESSAIS DE PHILOSOPHIE JURIDIQUE* 93 (1963) (concerning the asserted political character of law). "Il paroît bien étrange que les Loix Civiles n'étant presque toutes que des règles de l'équité, dont la connoissance nous est naturelle, l'étude qui devoit en être facile et agreable, soit se difficile et si épineuse." (It seems very strange that the civil laws, which are nearly all simply the rules of equity, the knowledge of which is natural to us, and the study of which should be easy and pleasant, should be so difficult and thorny.) Domat, *Preface to LOIX CIVILES DANS LEUR ORDER NATUREL* (1777).

<sup>407</sup> T. B. SMITH, *THE PRESERVATION OF THE CIVILIAN TRADITION IN CIVIL LAW IN THE MODERN WORLD* 7 (Yiannopoulos 1965).

<sup>408</sup> The circumstances under which the English Court of Chancery originated are described in KERLY, *HISTORY OF EQUITY* 37-46 (1890).

<sup>409</sup> "Whether a case is decided under the principles of the civil law or under those of the common law, the result is almost invariably the same." Rinfret (C.J., Canada), *The Civil Law and the Common Law*, 23 N.Y.U.L. REV. 8, 13 (1948). Ishwar Saxena,

scribed as a force which gives shape to the ideal of decent and honorable conduct in the relations of men. Divergence between legal systems is less frequent in areas which require the application of ethical standards comparable with those standards which are applied in other institutions of social control. The divergences make their presence manifest in areas where the lag between law and morals is greatest. The cleft exists; but is it unbridgeable? For five hundred years the western world was united under a single legal system known as the *ius gentium*. Equity is the crystallization of the fundamental yearnings of human nature toward a justice which shall be not only ordered but compassionate. When the principles of equity are recognized in all legal systems, we may hope for the establishment, through a *corpus aequitatis*, of what Vico called a *civitas humanis generis*, a society of human brotherhood. At any rate, we may catch "an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law"<sup>410</sup>

Rajasthan University, Jaipur, has expressed the opinion that even in the situations in which the rules and theories of different legal systems seem at first sight to be entirely different, it is often possible to find a common ground from the point of view of actual results. See 17 REVUE INTERNATIONALE DE DROIT COMPARE 122 (1965) (remarks at meeting of Parker School of Foreign and Comparative Law, New York, Sept. 14-15, 1964).

<sup>410</sup> Holmes, *The Path of the Law*, 10 HARV. L. REV. 478 (1897).